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REPORTS
OF
CASES DECIDED
IN THE
COURT OF OYER AND TERMINER
AND THE
Court of General Sessions of the
Peace and Jail Delivery
OF THE
STATE OF DELAWARE
BY
JOHN W. HOUSTON, ASSOCIATE JUDGE.
VOL. 1.

WILMINGTON, DELAWARE
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1920

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УВАЖАЮЩИЙ ОБОЗНАЧЕНИЕ

PREFACE.

This volume of Houston's Criminal Reports is published by the authority of Chapter 248, Volume 29, Laws of Delaware, approved April 2, 1917, which provides:

"That the Associate Judge of the Superior Court, resident in Kent County, be and he is hereby authorized and directed to have printed and published at least four hundred copies of Volumes 5 and 6 of Houston's Reports and of Volume 1 of Houston's Criminal Reports, etc."

I have deemed it best to make these volumes as nearly as possible a reprint of the original Reports.

WM. H. BOYCE,
Associate Judge.

Dover, Delaware, April, 1921

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The following Judges composed the Court of Oyer and Terminer and the Court of General Sessions of the Peace and Jail Delivery of the State, during the period embraced in this volume of Reports:

HON. SAMUEL M. HARRINGTON, Chief Justice; appointed April 3, 1855.

HON. EDWARD W. GILPIN, Chief Justice; appointed May 6, 1857.

HON. JOSEPH P. COMEGYS, Chief Justice; appointed May 18, 1876.

HON. JOHN J. MILLIGAN, Associate Judge; appointed September 19, 1839.

HON. EDWARD WOOTTEN, Associate Judge; appointed September 16, 1847.

HON. JOHN W. HOUSTON, Associate Judge; appointed May 4, 1855.

HON. LEONARD E. WALES, Associate Judge; appointed September 22, 1864, *vice* Judge Milligan resigned.

GEORGE P. FISHER, Esq., Attorney General; appointed March 28, 1855.

ALFRED WOOTTEN, Esq., Attorney General; appointed March 28, 1860.

JACOB MOORE, Esq., Attorney General; appointed September 3, 1864, on the death of Mr. Wootten.

CHARLES B. LORE, Esq., Attorney General; appointed September 26, 1869.

JOHN B. PENINGTON, Esq., Attorney General; appointed October 3, 1874.

GEORGE GRAY, Esq., Attorney General; appointed October 3, 1879.

For the information of those who may not be familiar with the constitution and jurisdiction of the criminal courts whose decisions are reported in this volume, the author deems it proper to state that the Court of Oyer and Terminer when called consists of the Chief Justice and the three Associate Judges of the State, but any three of them constitute a quorum for the trial of cases, and which has sole and exclusive jurisdiction of the following crimes: treason against the State, murder, manslaughter, rape, arson and burglary when it is perpetrated with intent to commit murder, rape, or arson, whether such intent be executed or not; and all of which are capital crimes with the exception of manslaughter, and murder of the second degree. The Court of General Sessions of the Peace and Jail Delivery consists of the Chief Justice and two of the Associate Judges when full and in session for the transaction of business and the trial of cases, the Associate Judge not constituting a member of it in the county in which he is appointed, and in which he is required to reside, but any two of the Judges which compose it constitute a quorum for the trial of cases in it, and which has the sole and exclusive jurisdiction of all other indictable offenses under the constitution and laws of the State; for no appeal lies from either of these courts to any other judicial tribunal established by the State, nor does a writ of error, or any process equivalent to a writ of error, lie to either of them from any other tribunal established by it.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* JOSEPHINE PARKER.

The property in gold or silver coin must be alleged to be of the money, and not of the goods and chattels, of the party from whom it was stolen, in an indictment for larceny.

Sussex County, Court of General Sessions, &c., April Term, 1856. The indictment in the case was for larceny and alleged the property stolen to be one pice of gold coin of the value of one dollar, four pieces of silver coin commonly called quarter dollars, of the value of twenty-five cents each, and one ten dollar bank note of the Marine Bank of Baltimore of the value of ten dollars, "of the goods and chattels of Sally Lynch." There was no proof as to what bank the note was of, and the objection was taken that no conviction could be had for the taking of the coin, because it should have been alleged in the

indictment that it was of "the money," instead of "the goods and chattels" of the party who owned it.

And of this opinion was the *Court*. The statute on which the indictment was founded, recognizing and making a distinction between coin or specie and other personal property, denominating the former as money, and the latter as goods and chattels, and it therefore directed the prisoner to be acquitted.

THE STATE v. GEORGE M. TOWNSEND.

A prisoner indicted for larceny under the laws of the State and returned by the Sheriff *cepi corpus* and in his custody, will be tried for the offense, notwithstanding he is also in his custody as the deputy of U. S. Marshal of the district, and in the jail of the county under the statute of the State allowing the use of its jails in such cases, for robbing the U. S. Mail.

N. C. County, Court of General Sessions, &c., May Term, 1856. The defendant was indicted for larceny and upon his case being called, *Gordon*, his counsel, objected to the Court's proceeding to try it, because the prisoner had been arrested by the U. S. Marshal of the district for robbing the mail, and was then in the custody of the Sheriff as his deputy and in the jail of the county under the act of the Legislature allowing the use of the jails of the State for such purposes, and referred to the provisions of our *habeas corpus* act, which excepts persons in custody for offenses under the laws of the United States from the operation of that act.

But the Court overruled the objection and remarked that the sheriff had made return to the capias issued out of this Court for his arrest on this indictment, *cepi corpus*, and the prisoner was now in the dock. That the Court had no sufficient evidence of the facts stated by the counsel for the prisoner, and even if it had, it would appear that for the offense alleged against the laws of the United States, he was in the custody of the sheriff and the public jail of the county by the courtesy of the State, and there was no rule or principle of comity which required this Court for the reasons assigned to decline to try the prisoner for his alleged offense against the laws of this State.

THE STATE v. LEVIN VINCENT.

In criminal confessions the Court will presume that the magistrate has performed the duty enjoined upon him by law, and reduced the admission or statement to writing, but not that it was assented to or signed by the accused after having been read over to him, and without proof of such fact, parol evidence of it is admissible.

Sussex County, Court of General Sessions, &c., April Term, 1857. The indictment was for larceny and the prosecuting witness was proceeding to speak of a confession made by the prisoner before the committing magistrate at the time of the hearing, when he was stopped by his counsel with the enquiry, if it was reduced to writing by that officer, to which he replied that he did not know, that he wrote something on his docket during the time the prisoner was making his statement, but whether it was that, or not, he could not say, upon which the objection was made that it was to be presumed the magistrate duly performed his legal duty on the occasion and reduced it to writing, and without the production of it, or proof of the loss of it, no parol evidence of the statement and confession by any witness present at the time was admissible.

Fisher, Attorney General, in reply to the objection, cited *State v. Eaton*, 3 Harr. 554, and *State v. Johnson*, 5 Harr. 507.

The Court after considering the question, recognized and reaffirmed the distinction ruled in the cases cited, and in conformity with the general principle stated in 2 *Russ. on Crimes*, 876, and said the Court would presume that the magistrate had done his duty in the premises, and as the statute expressly required him to examine the accused, taking his voluntary declarations, and to reduce his examination to writing and read and tender it to him for his approval and his signature, as thus reducing to writing, the Court would assume that he had done all which the statute required of him to do in the case. But as the statement when thus reduced to writing and tendered by him to the accused, could have no sanction or effect as his confession without his signature, or his assent to the correctness of it, it could not be evidence without proof of that fact, or the Court's further presuming also that the latter had signed, or assented to it, but which it was neither required to do, nor warranted in doing. For in the latter particular our statute went further than the English statute in similar cases, which only required the magistrate to reduce the confession to writing, but not to read or tender it to the accused, as ours does, for his signature, or approbation. The objection was therefore overruled, and the testimony was admitted.

COURT OF OYER AND TERMINER.

THE STATE *v.* DAVID DAVIS.

If a fight suddenly springs up between the prisoner and another on the one side, and the deceased on the other, in the course of which he receives a sudden blow on the head with a stick of which he dies the next day, with no other evidence of premeditation or deliberation, it will constitute the crime of manslaughter only; and it matters not which of the two struck the blow, if the prisoner and his companion were engaged together at the time in the fight with the deceased.

New Castle County, May Term, 1857. At a Court of Oyer and Terminer held at this term, David Davis, *alias* James Saunders, was indicted and tried for the murder in the first degree of David Carr.

The prisoner and another called at the tavern of the deceased in Brandywine hundred for breakfast about eleven o'clock on the morning of the 5th of December, 1856, which was furnished them. Both of them, and the prisoner particularly, used much profane language whilst they were at the breakfast table in the presence of the woman waiting upon it. After breakfast they returned to the bar room and remained there until about half-past 3 o'clock

in the afternoon, the prisoner talking quite loud to every one who came in, and at other times apparently asleep with his companion in the room. In passing by the bar room door about that hour, the waiting woman before referred to, observed the prisoner and his companion standing before the bar disputing with each other about a quarter of a dollar, and the landlord, David Carr, leaning over the bar and looking at them, but saying nothing; and immediately after ascending the stairs on her way by the bar room door, she heard a scuffle below in it, and a cry in a loud voice which she distinctly recognized as that of the prisoner, "God damn him, kill him!" She then heard a fall as of a body on the floor below, and hurrying down stairs, saw David Carr lying on the passage floor just outside of the bar room, and the prisoner and his companion standing one on either side of him, when they immediately fled and ran off towards the railroad. Carr died the next day of a fracture five inches in length on the right side of the scull produced by a blow with a club or heavy walking stick, and was also severely kicked with a heavy boot. The prisoner was arrested that evening in Chester, Pennsylvania, and when taken into custody the next morning by an officer from this State and his attendant, his first inquiry of the latter as soon as he saw him was, "how is the old man?" And when informed by him, "that he was alive, and that was all," the prisoner replied "that it was an awful case."

The prisoner in reply proved by a number of very respectable witnesses who had known his character very well, that it had before been good for peace, amiability and industry.

Fisher, Attorney General, defined the crime of murder at common law. 4 *Black. Com.* 195. And express malice at common law. 4 *Black. Com.* 198. But if the State had failed to prove that the killing had been committed with such deliberation as to constitute express malice as

so defined, the prisoner should be convicted of murder with implied malice and in the second degree, provided the jury should be satisfied from the evidence that it was done by the prisoner with any degree of deliberation, however slight, and without any assault or attack made upon him by Carr, or any mutual combat before commenced between him and the deceased. For unless he had been assailed or attacked by Carr, and an actual combat had ensued between them before the fatal blow was inflicted, there could be no ground for reducing the crime to the grade of manslaughter.

David Paul Brown, for the prisoner. Unless the State had proved to the satisfaction of the jury that the prisoner struck the fatal blow, they could not convict him of murder in either degree, or of manslaughter. But even, if he struck the fatal blow, it was not murder of the first degree, because the circumstances proved negatived the existence of express malice; and the gross state of intoxication he was in at the time, would itself reduce the crime to murder in the second degree under the statute. *Whart. Law of Homicide*, 369. But in addition to that it had been proved that these two drunken men fell by the ears and got into a scuffle and battle when the mortal blow was suddenly given, by which of them is not known, with a stick at hand, as suddenly seized up without premeditation, or pausing for an instant to procure it; and which could at furthest only constitute it manslaughter.

Fisher, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury, That the Court did not deem it necessary under the facts proved to enter into any consideration of the question of murder in the first or second degree, but if from the evidence it appeared to the satisfaction of the jury that a fight suddenly sprung up between the prisoner and his companion and David Carr, the landlord, at the time and place

stated, in the course of which the deceased received a violent blow with a stick on the head of which he died the next day, and there was no other evidence of premeditation or deliberate intention to do him a severe bodily injury, or to kill him, than the sudden act itself simply afforded, it would constitute the crime of manslaughter, and not murder in either degree in contemplation of law. And in that view it mattered not which of the two struck the blow, if the prisoner and his companion were acting together and were both engaged at that time in the fight or combat with the deceased.

Verdict—Guilty of manslaughter.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* DRAPER HOOPER and ANNIE HOOPER.

In a case of binding under the third section of the statute, it is sufficient if the approval of the justices appears anywhere in or upon the indenture.

It is only the money stipulated to be paid to the parent, and not to the servant indentured on the expiration of the service, that is required to be paid in instalments; and although the sum was fifteen, instead of ten dollars, it was no ground of exception to the indenture, for the statute leaves it to the discretion of the justices to designate the amount to be paid to a colored child in lieu of education.

On an indictment for harboring such an indentured servant, the record of the indenture will be admissible in evidence, although the original was not delivered by the justices to the Recorder of Deeds for the county, within the time prescribed by the statute. Nor can the indentured servant avoid it for that reason by leaving the service.

Sussex County, Court of General Sessions, &c., October Term, 1857. Indictment of the defendants for harboring an indentured servant.

Fisher, Attorney General, offered in evidence the public record of the indenture executed before two justices of the peace, under section 3, chapter 79 of the Revised Statutes 245, which contained no certificate of approval by the justices, and which was dated June 3d, 1856, but was not delivered by them to the Recorder of Deeds for the county, until September 2d, 1856.

E. D. Cullen, for the defendants, on these grounds objected to the admissibility of the record, and contended that it was, therefore, absolutely void, as it was not in conformity with the provisions of the statute; for although it had been decided by the Court in the case of *Luby v. Cox*, 2 *Harr.* that it was not void, but only voidable for that reason, and if not avoided by the apprentice, would be binding upon the master, in the present case the indentured party had done that, had renounced and repudiated it by leaving the service of the master, as the Court would judicially take notice, and which was implied and admitted on his part by this criminal complaint and proceeding in the case. *Luby v. Cox*, 2 *Harr.* 184. 4 *Taunt.* 877. 1 *Anstru.* 256. *Platt on Cov.* 3 *Law Lib.* 257. 15 *Pick.* 572. 2 *Kent's Com.* 236. 2 *Pick.* 332. *Bingh. on Infancy*, 63.

Fisher, Attorney General, replied.

By the Court: Under the present statute no formal certificate of approval by the justices is now required, as under the former act on the subject. In a case of binding under the provisions of the third section of the act as it now stands, it was sufficient if their approval appeared any where in or upon the indenture, and in this case it appeared in the body of it, and it could not appear or be otherwise from the fact that they executed it and bound the servant to the master. As to the second objection, it was only the money to be stipulated in the indenture to be paid to the parent, instead of to the party bound on the expiration of the term of service, that is required to be

paid in installments, and although the sum was fifteen instead of ten dollars, it was no ground of exception to the indenture, for the statute leaves it to the discretion of the justices to designate the amount to be paid to a colored child in lieu of education. In regard to the third and last objection that the indenture was not delivered by the justices to the Recorder within the time required by law, the act in this case differs from the act for the recording of deeds, which expressly provides that the record in the latter case shall only be evidence upon the deed's being recorded within one year after its execution. But the act in relation to apprentices contains no such provision, for it does not even expressly say that the indenture when deposited in the office shall be recorded, or even that the record of it shall be evidence, as it does in case of an assignment of the indenture. But as the act requires it to be delivered to that officer, it is evidently for the purpose of being recorded with a view to preserve the evidence of it, whilst the provision in relation to the assignment of it, in terms requires that it shall be recorded with the original. Still the act not prescribing the time within which the original shall be recorded, but simply making it the duty of the justices under a penalty of five dollars to deliver it within sixty days to the recorder, we do not think it a sufficient ground for excluding the record offered in evidence, that the original was not delivered to that officer until ninety days after it was executed. And we are of the opinion that there is nothing in the exceptions taken to show that it was not in conformity with the provisions of the existing statute on the subject. But if it were otherwise, and there was anything to show that it is not in conformity with them, and was, therefore, voidable in law, inasmuch as the statute expressly provides a specific remedy and mode of relief in such a case for the indentured party, we do not think he can lawfully avoid it by leaving and abandoning the service of his master at his own will and pleasure, or that a third person in a collateral proceeding like this, in which the validity of the

indenture is involved incidentally and indirectly only, can be allowed to avail himself of such an objection to it as any defence against an indictment for harboring the apprentice or servant after leaving the service of the master.

Cullen. But the binding in this case was under the third section of the statute, whilst the proviso contained in the sixteenth section of it, which gives the apprentice his redress by petition to the Court, or a judge in vacation, provides that such tribunal shall not enquire into any matter of objection to the indenture, but cruelty, ill-usage, or treatment not conformable to the terms of the binding.

Gilpin, C. J. Well, if that be so, then for a stronger reason this Court cannot enquire into the matter of your objection in an entirely collateral proceeding at the suit of the State on an indictment against a third person for harboring the apprentice after he has forsaken the service. In this particular case the statute may be a very hard one towards the apprentice; but this is wholly a statutory matter, and we can only take the law as we find it.

The record was admitted in evidence.

COURT OF OYER AND TERMINER.

THE STATE v. JAMES JONES.

The Statute has introduced no essential change or alteration in the crime of murder as it exists at common law in respect to the malice which constitutes the offence, although it divides it into two degrees for the purpose of discriminating in the punishment and penalties imposed by it according to the proof and kind of malice with which it is committed.

Kent County, October Term, 1857. At a Court of Oyer and Terminer held at this term, James Jones was indicted and tried for the murder in the first degree of Henry C. Ralston. Both parties together with four other colored men, were at the time when the murder was alleged to have been committed, in the employ and living at the house of Mr. S. Fisher, a farmer of the county. On the night of the occurrence while they were all up stairs, a quarrel arose between the prisoner and the deceased, about a lamp, during which the deceased cursed him and made some remarks to him when he replied that he would not get up and go down stairs and say that to him. The deceased said he would and jumped up and they all went down stairs into the yard, when the prisoner and the deceased at once commenced fighting, but Mr. Fisher soon stopped it, when they all went out into the public road where they renewed their fight, and when Mr. Fisher again went to

them to stop it, he found the prisoner down with the deceased on him, and pulled him off and separated them. As soon as that was done the deceased said he was badly stabbed. There were three wounds inflicted with a sharp pointed blade of a Barlow knife, two on his back and another between the eighth and ninth ribs on the left side about two inches in length and penetrating the stomach, and of which he died the next afternoon. The knife was taken from the pocket of the prisoner and was admitted by him to be the one with which he had inflicted the wounds. He also said in the morning after it was done, that he had cut him with a small knife, and wished that he had killed him; that Henry was always imposing on him and would not let him alone. His general good character was put in evidence and was proved by respectable witnesses and was not disputed.

For the State it was contended that there was sufficient proof of antecedent malice and of a premeditated design to kill or, at least, dangerously to cut and stab the deceased in the combat, to constitute a case of murder with express malice aforethought and in the first degree under the statute.

For the prisoner it was contended that it could not be deemed or held to be under the facts and circumstances proved, any offence above the grade of manslaughter.

The Court, Gilpin C. J., charged the jury.

At common law the crime of murder consists in the killing of a human being with malice aforethought, either express or implied, and is of but one degree, and the same constitutes the crime of murder in this State under the present statute, for it has introduced no essential change or alteration in that respect in the offence as it exists at common law, although it divides and defines it in two degrees for the purpose of discriminating in the punishment and penalties imposed by it according to the proof and the kind of malice with which the crime is committed.

When the crime is committed with express malice

aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, that is to say in general, when it is committed with a sedate, deliberate mind and formed design to take the life of, or to do some great or serious bodily injury to, the person killed, and which deliberate intent is usually indicated by other and attending facts or circumstances, such as previous threats, former enmity and menaces, lying in wait, or in the preparation of means to effect the purpose, or intent, it is murder with express malice aforethought at common law and of the first degree under the statute; but when the crime is committed without any such sedate, cool or deliberate purpose, and without any such attending facts or circumstances, and also without any great or considerable provocation on the part of the person slain, and in the sudden heat of blood and passion thereby produced on the part of the accused, to mitigate or alleviate the offence, and thus to reduce the offence to a still lower grade of homicide, it is murder with malice implied by law, as it is termed, and of the second degree under the statute. Any unlawful killing of a human being without malice such as we have just defined, is manslaughter at common law and under the statute; and whenever one person is killed by another, unless it be under sentence of the law, it is presumed in law to be unlawful and to have been done with malice aforethought, until the contrary appears.

The jury must therefore be satisfied by the proof in the case that the prisoner in killing the deceased, was actuated by express malice aforethought, or by implied malice as before defined, in order to convict him of murder in the first or second degree, according as the one or the other grade or degree of malice may have been shown or established by it to their satisfaction.

If upon a sudden brawl, two persons come to blows and in the sudden heat of passion produced by it, the one gives the other a mortal blow, or a fatal wound with a knife or weapon seized at the moment, without any pre-

vious design, premeditation or preparation for it, although such an act is prompted by hatred, enmity, ill-will and desire to injure the other, yet out of the consideration and indulgence which the law has for the infirmities of human nature, under such circumstances of aggravation and provocation, it will not constitute murder at common law, or in either degree under the statute, but only the crime of manslaughter. But if on the contrary, the jury are satisfied from the evidence in the case that at the time when the altercation arose between the prisoner and the deceased, the prisoner was then actuated by malice against the deceased and invited him out to fight, either in the yard or afterward in the public road, for the purpose and with the design then formed in his mind, to stab him in the fight with the knife which he then had about him, the killing would in such case constitute not the crime of manslaughter merely, nor even murder in the second, but in the first degree under the statute. The Court, however, will take occasion to say that this must not be a matter of supposition or conjecture merely on the part of the jury, but must be proved like any other fact or ingredient necessary to constitute such a crime; and without proof of it to their satisfaction, it would not amount to murder in either degree under the statute, but to the crime of manslaughter only.

Verdict—Guilty of manslaughter.

THE STATE *v.* SILAS HOLLIS.

Neither fear, nor apprehension of death, or of great bodily harm will totally excuse one person for killing another; but to have that effect in law the danger must be imminent and impending at the instant, and real, and not imaginary. He must also have declined the combat, and retreated from his assailant, as far as he could have done so consistent with his own safety, or it will amount to manslaughter.

Sussex County, April Term, 1858. At a Court of Oyer and Terminer held at this term, Silas Hollis was indicted

and tried for the murder in the first degree, of Robert Morris on the 21st day of August, 1857, at St. Johnstown in Sussex County. The evidence disclosed a deep-seated hostility on the part of the deceased against the prisoner, and repeated declarations of a determination to either whip or to kill him, or be killed by him, and of which the prisoner had been apprised by others prior to the day of the killing. A witness testified that he was at St. Johnstown on the day of the occurrence, when the deceased drove up and stopped and invited him to take a seat in his carriage with him, and that soon after he had done so the prisoner drove up in his carriage and getting out of it, sat down on a log within hearing of him, but before that, and as he drove up the deceased remarked to him "there's Silas Hollis, applying a very vulgar and opprobrious epithet to him, and adding that he intended to sluff him before he left the place. That he endeavored to dissuade him from his purpose and from getting out of his carriage, but he only seemed to take offence at his efforts, got out of the carriage and went up to where the prisoner was sitting and said something to him, when they sat down together and entered into conversation with each other; and very soon afterward he saw the prisoner offer his hand to the deceased and heard him say to him "let us drop all these matters and make up," but the deceased refused to take his hand and cursed it. Very soon afterward he heard the deceased say to him that he had "a d——d worthless bitch of a wife," to which the prisoner instantly replied that he did not wish to hear anything more on that subject and when both sprang to their feet, face to face, the deceased shaking his fists with great violence in the face of the prisoner and abusing and cursing him in the coarsest terms all the while, the prisoner for a time remaining entirely passive and silent in his position. This continuing, however, after a short time he said to the deceased, he did not want him to strike his fists too long about his head, to which he replied that he could strike his fists about his head as long as he pleased, and damn

him, he could whip him besides. Pretty soon after that they closed for a fight, but persons in the surrounding crowd interposed on either side and separated them, the prisoner's face being severely scratched in the collision. The prisoner then seized and picked up a stave from the ground, but on the application of a by-stander, surrendered it to him, and subsided again into comparative silence and inactivity, the deceased struggling with great fury and violence to escape from those who were detaining him, and to rush again towards the prisoner. Finally he effected his escape from those detaining him, and suddenly snatched up from the ground lying near him, a green persimmon stick or pole two or three inches in diameter, and just as he had recovered his erect position and drawn it back in both hands to strike, the prisoner rushed at him and struck him with a stave on the head and felled him to the earth. He was never able to rise or stand afterward without assistance, and soon became unconscious and died on the following day. The stave was four or five feet long, three or four inches wide and about an inch thick. The blow struck with it was on the parietal bones of the head, producing a wound of the skull three inches in length and a half an inch in depth, and the *post mortem* examination disclosed a fracture of the skull beneath it between two and three inches in length, and about five ounces of coagulated blood upon the brain.

Fisher, Attorney General, contended that it constituted a case of murder in the second degree.

C. S. Layton, (*W. Saulsbury* with him,) for the prisoner, contended that the killing was in self-defence, and that it was a case of excusable homicide. *Archb. Crim. Law* 391. 1 *Russ. on Crimes* 660, 662, *n*.

The Court, Gilpin C. J., charged the jury. The killing of one person by another being proved, it is presumed to be felonious and malicious and murder at common law,

because malice is at least implied from the act of killing, until it otherwise appears, and circumstances of alleviation or mitigation must be shown, or must appear in the proof on the trial, to rebut that presumption. It has been conceded, however, by the prosecution in this case that the facts and circumstances proved do not afford evidence of that degree of malice which is denominated express malice in law, and that it is not, therefore, a case of murder in the first degree under our statute. And we will go further, and say to you now that we do not think that this constitutes a clear case of murder, even of the second degree under it; and we say so because we do not think the facts proved, warrant or justify such a conclusion, and if such a verdict should be rendered, with our view of the application of the law to the facts and circumstances in proof before us in the case, we should feel constrained to arrest the judgment. But neither fear, nor apprehension of death, or of great bodily harm, will totally excuse one person for killing another; but to have that effect in law, the danger must be imminent and impending at the instant, and it must also be real and not imaginary. He must also have declined the combat and retreated from his assailant as far as he could do so consistent with his own safety, and the hazard to his life or person must be so great, so pressing and immediate as to admit of no further retreat, on his part to avoid the necessity of killing his assailant, without imminent danger to his own life or person, or affording some great advantage to him in the crisis impending between them. He would, in conclusion, say to the jury that if they believed the evidence, it was in the opinion of the Court a case of manslaughter.

Verdict accordingly.

THE STATE *v.* CLEMENT HURLEY.

Malice is the essential ingredient of murder, and is known to the common law as of two kinds, express malice and malice implied by law. At common law and under our statute, express malice exists when the killing is done with a sedate, deliberate mind and formed design, evidenced by external circumstances, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some great bodily harm. And malice is implied by law when the killing is done without such a sedate, deliberate mind and formed design, and there is no such fact or circumstance attending it which indicates coolness, deliberation, premeditation, or such preconceived design or purpose. When, however, it is suddenly done in the heat of blood or violent passion, and on an adequate and sufficient provocation to produce it in contemplation of law, the implication of malice is repelled and rebutted, and it constitutes the crime of manslaughter.

Drunkenness is no excuse for murder, or any other crime; but a less provocation of the kind before referred to may suddenly heat and blind a man with angry passion in that condition than a sober man under the same provocation, and may be considered by the jury in determining the sufficiency of it to rebut the implication of malice and reduce the killing from murder in the second degree under the statute to manslaughter. And when antecedent menaces or threats, or revengeful expressions have been uttered by one in that condition, it is for the jury to consider and determine whether they were the idle and unmeaning declarations of a drunken man merely, or indicated actual malice and an intention to do what he threatened; for the law considers a drunken man capable of entertaining express malice. But as *mania a potu* is the secondary effect of intemperance, and is a species of insanity, it is a defence against any of these crimes when proved to the satisfaction of the jury.

If the jury after maturely considering all the evidence for and against the prisoner have a reasonable doubt that he killed the deceased, they should give him the benefit of such doubt; but such is not the rule in relation to the defence of insanity.

Sussex County, April Term, 1858. At a Court of Oyer and Terminer held this term, Clement Hurley was indicted and tried for the murder in the first degree of Elizabeth Hurley, his wife. In consequence of his extreme intem-

perance and cruel treatment of her when intoxicated, she had temporarily separated from him, and being at the house of a son of hers by a former husband, on Friday preceding her death, he went to see her and asked her when she was coming home, to which she replied, when the weather got better, and on the following Monday before her death he went to see her again and made the same inquiry of her and then said to her that he had a pint of whiskey and that day he thought they would be married, to which she replied that she had married him once to her sorrow, and she did not expect to live with him again until he got to be a sober man. He then said he wanted her to come home to him, and she would not be home three days before she was in hell. He was intoxicated at that time. On the Friday following she went home to him, and on the following Sunday morning her dead body was there found lying diagonally across the bed in which it was found, and entirely covered up and concealed from sight, on entering the room, in the bed clothes of it. Her throat and neck on both sides of it were bruised and were blue and swollen. The darkest part of the bruise, which was of the width of a man's hand, was on the right side, and there were prints or appearances of the pressure of fingers on the left side of the throat. Her left eye was also bruised and discolored, her left arm and shoulder had been severely bitten, the left thumb nearly off, and there was blood on the bed clothes, and on the wall near the head of the body, which looked as if it had been made by a bloody finger pressed against it. The body was also scratched in several places; and in the opinion of the physician who examined it, her death had been produced by choking and suffocation.

When the constable and the party which accompanied him arrived at the house to arrest the prisoner, they found him lying on the bed on which the dead body of the deceased lay, and when apprised by the officer of his object, he denied that he had killed her, but afterward admitted it both to him and to others. He was not then

drunk, but walked straight and talked rationally; he had, however, been drinking very hard for three weeks previous to the occurrence. For the defence it was proved, by one of the witnesses, that on Wednesday after his commitment to prison he had *mania a potu*, and by physicians, that a crime committed by a person in that condition, may have the effect, by emotional influences, to restore his reason. And also that he was a man of weak mind, but when sober that he was peaceable and inoffensive in his temper and disposition.

Robinson, for the prisoner, contended that the facts proved, and particularly the character of the wounds on the body of the deceased and the manner in which she had been killed, as no weapon, or implement of any kind whatever, it was evident, had been used on the occasion furnished strong presumptive evidence that it was the result of a fierce and mortal conflict at the time between the parties; or, if it was not, that then it must have been the work of a husband for the time being bereft of his reason, and utterly unconscious of what he was doing. If it was the result of a quarrel and collision suddenly springing up between them, and was without any premeditation or malice on the part of the prisoner, it could not be murder of the first, or even second degree, but only manslaughter; and the presumption was not only strong, but even violent, that such was the case from the fact that no weapon, implement or instrument of any kind, not even so much as a penknife had been used in the struggle which evidently attended it; and also from the fact that there was not the slightest trace whatever to be discovered of any premeditation or preparation on his part for the purpose, because those who have their reason and intend to kill or murder their fellow beings, do not generally go about it with their teeth and hands only. He would therefore repeat that if the killing was the result of such a quarrel and collision between them, begun without any premeditation or design

on his part to take her life before it occurred between them, it could not constitute murder of either degree, but manslaughter merely. But if the jury should be satisfied from the facts and circumstances proved that the act committed by the prisoner was occasioned by his long continued and excessive drinking of intoxicating liquors, and he was thereby so far deprived of his reason, reflection and apprehension, as not to be conscious at the time that he was killing his wife, then he was not criminally responsible for the act, and could not be convicted of any offense in the case. And he requested the Court to instruct the jury that if they should entertain a reasonable doubt in regard to that matter, the prisoner would be entitled to the benefit of it.

Fisher, Attorney General, replied that the facts proved, the threat at the house of her son only a few days before her return home, and the way in which the act was committed, as well as the fact that she had been compelled by his intemperance and cruel treatment to leave him, and the deep offense which she had given him by leaving him, showed alike the antecedent menace, former grudge and the express malice of the prisoner against her; and as there was not a particle of proof of any quarrel, collision or fight between them in which the killing, as it had been suggested on the other side might have happened, if the case was to rest or to depend on presumptions merely, it would be much more reasonable to presume after all that had actually occurred and been proved in the case, that his desire to get her home again was prompted solely by enmity and malice against her, and that his only wish then to get her home was for the premeditated purpose of killing her, particularly as it was done by him so soon after her return there. As to the matter of a reasonable doubt entertained by the jury, it could properly have no reference to the point raised or the question propounded in the present case, but could have relation only to the *factum* of the offense in any case.

The Court, Gilpin C. J., charged the jury. That malice was the essential ingredient and characteristic of the crime of murder, and was known to the common law as of two kinds, express malice aforethought and malice implied by law, as it is termed. In its legal sense malice had a broader and more comprehensive meaning than in its ordinary acceptation. In its latter sense it was understood to import simply hatred or ill-will entertained by one person against another, but in its former or legal sense, its meaning was broader and signified a wicked and depraved spirit or disposition regardless of social duty and fatally bent on mischief. According to the common law and our statute, express malice aforethought exists when the killing is done with a sedate, deliberate mind and formed design, evidenced by external circumstances, such as lying in wait for the purpose, antecedent menaces, former grudges, or in concerted schemes to do the party some great bodily harm. But these were only some of such external or attending circumstances which indicate the inward intention and serve to show the sedate and deliberate purpose or design to kill, or to do some act which necessarily results in death, and are therefore evidence of actual, positive, or as the law terms it, express malice. But when the act of killing is committed without such a sedate and deliberate mind and formed design to do it, and, there is no such act, or circumstances attending it which indicates coolness, deliberation, premeditation, or such a preconceived design and purpose, it is in contradistinction to the description or degree of malice before stated, implied malice, or malice implied by law; because although it is not proved, by such direct and conclusive evidence of actual malice and deliberate intent to kill, as in the preceding case, yet the facts and circumstances attending on the commission of the deed and the manner and the motive in and with which it is done, with enough of that calm and deliberate depravity and malignity of a bad heart which constitutes in all cases of murder the essential element or ingredient of the crime, and which the law

denominates malice, is sufficient to justify the presumption and to warrant the belief and conviction that it was committed with such a degree of deliberation as we have last mentioned, and therefore in such a case, the law presumes or implies that it was committed with malice. But at common law the crime is one and the same, whether committed with express or implied malice, and it is in either case murder of the same degree and punishable with death. When, however, the act is suddenly committed in the heat of blood or violent passion, upon an adequate and sufficient provocation given at the time, and without premeditation indicating coolness and design as before stated, and without time to cool, inasmuch as these conditions and circumstances are considered to rebut and repel any presumption or implication of malice whatever in such a case, it constitutes in contemplation of law the crime of manslaughter; and as every unlawful killing of one person by another is upon the proof of the act presumed in law to have been done with malice, and is *prima facie* murder, the law requires in every such case that the accused shall show to the satisfaction of the jury upon his trial, or that it shall so appear from the evidence on the part of the State, that it was done, not only without express malice aforethought, but also without implied malice, or in other words, that the act was committed under such attending circumstances and conditions as before stated, as will have the legal operation and effect to negative and rebut the presumption or implication of any such malice on his part at the time when it was done. There are two instances given in the books which will serve to illustrate and explain more clearly the apparently nice distinction in the law on this point. The first is the case of a fight or combat between two persons, in which one in the heat of blood and passion produced by it, suddenly but without any previous preparation for it, such as providing himself beforehand with a dangerous or deadly weapon for the purpose, kills the other, in which case the circumstances

attending it, and the absence of any further proof to the contrary, negatives both in point of law and in point of fact any express malice aforethought, and also any presumption or implication of malice such as we have before described in defining the crime of murder with implied malice, and the crime is therefore manslaughter merely. But even in such a case as we have just stated, if the mortal blow is not struck, or the wound be not given during the conflict, nor until the party has afterward had time to cool and for reflection, it will not be manslaughter, but murder in either the first or second degree under the statute, according to the premeditation and deliberation with which the act may afterward be done, and the time which he may afterward have to cool and recover from the transport of passion occasioned by it. The other is the instance when one party is assailed by the other in a way and with out any means to seriously endanger his life or personal safety at the moment, and he suddenly and coolly kills him with a deadly weapon, without any necessity for resorting to such means to repel the attack or to save his life or person from great and imminent peril impending at the moment, and without any other provocation than the assault merely, it will not be manslaughter; but with no express malice aforethought in the case against him, and no other provocation than such an assault only, it will constitute, in contemplation of law, implied malice, and murder in the second degree under the statute.

It had been hypothetically suggested by the counsel for the prisoner that the facts and circumstances proved in this case, particularly as there was no proof, nor any indications whatever, that any other means than his hands and his teeth were used in killing the deceased, it furnished a strong and even violent presumption that it was the result of a sudden quarrel and fight between them, and that it was done in a sudden transport of rage and passion on his part produced by it, and without any premeditation or previous design to do it, such as would show

express malice aforethought, or even warrant or sustain the presumption that it was done with implied malice. He had also suggested and contended that the facts and circumstances proved warranted the opinion and belief that he must at the time have been utterly unconscious of what he was doing in consequence of his excessive and protracted indulgence in the use of intoxicating liquors for three weeks prior to it, and the secondary effects produced by it, resulting in a species of temporary insanity or madness termed *mania a potu*.

As to both of these suggestions the Court would simply remark and repeat what had before been said that when the unlawful killing has been proved in any case to the satisfaction of the jury, the law presumes or infers that it was done with malice, and that it is murder, until it is made to appear to the contrary from the evidence on the trial, and whatever the defence under the facts and circumstances proved may be, whether it is not guilty of murder, or not guilty at all, it is alike the duty of the accused to prove and establish to the satisfaction of the jury the particular defence on which he relies, unless it so appears from the evidence on the part of the State; and if he fails in this, it is the duty of the jury to return such a verdict as the facts and circumstances proved in the case and the law applicable to it requires. The facts and circumstances proved were all before the jury, the unhappy domestic relations subsisting between them as husband and wife, and the cause of them, the previous threat of the prisoner uttered a few days before the occurrence when in a state of intoxication, the return of the deceased in a short time thereafter to him and her home, with the sad and shocking condition in which her lifeless body was there found in two or three days thereafter, were all before the jury and they were the sole judges after calmly and dispassionately reviewing and maturely considering all of them, what should be the verdict in accordance with the evidence and the law which had been announced to them by the Court in the

case. It would be proper and necessary for the Court, however, further to notice and instruct them in regard to another matter of defence suggested by the counsel for the prisoner and which was that if the jury were satisfied from the evidence that he was drunk when he committed the act that the law in that case, repudiates and negatives the idea, or possibility that it could have been committed with express malice aforethought, and that consequently he cannot be convicted of the crime of murder in the first degree, or of any greater crime than murder in the second degree under the statute. But we are obliged to say to you that as a general rule in regard to such a defence, drunkenness is no excuse for murder or any other crime whatever, and there are but two cases in which it can have the effect to mitigate or extenuate the crime for which the prisoner stands indicted, one of which is when it is proved to the satisfaction of the jury that it was committed by the accused in a state of intoxication or drunkenness and upon a certain provocation given him by the party killed, and when a smaller provocation may be allowed to alleviate the offense, and reduce it from murder in the first to murder in the second degree under the statute, owing to the well-known fact that a person in that condition is more liable to be suddenly heated and blinded to a higher degree by angry passions than a sober man would be under the same, or a similar provocation. The other is when antecedent threats, menaces or malicious and revengeful expressions are proved to have been uttered by the accused when drunk or intoxicated, and when it always becomes a legitimate matter for the grave consideration of the jury whether they are but the idle and unmeaning declarations and denunciations of an angry and drunken man merely, or are properly to be regarded as of graver and more serious and sober import, denoting an actual intent to do what he threatens; for the law presumes a drunken man to be capable of conceiving and entertaining even express malice aforethought and perpetrating with premeditation and design murder in the first degree under the statute.

And this brings up to what was said by the counsel for the prisoner in regard to his defence on the ground of *mania a potu*, and on that subject the Court would say to the jury that if they were satisfied and believed from the evidence which they had heard, that the prisoner was at the time he committed the act affected with and laboring under an attack of that disease or malady and a brief and temporary madness or insanity, the result of protracted hard drinking of spirituous liquor for several weeks immediately preceding the commission of the act, and that he was thereby rendered positively unconscious of what he was doing and incapable of distinguishing between right and wrong with reference to the act he was then committing, it would constitute in law a complete and entire defence to the whole prosecution, and he should be absolutely acquitted. But that was a matter of defence not to be presumed, but must be proved like any other matter of defence in this case to the satisfaction of the jury, for otherwise it could be of no avail to the prisoner.

There is but one more matter which the Court feels called upon to notice in the case, and that was the concluding request of the counsel for the prisoner that we should instruct you that if after a mature consideration of all the evidence in it, you should have any reasonable doubt on this last point as to the mental capacity and criminal responsibility of the prisoner for the act in question, you should give him the benefit of such doubt in making up your verdict. But the Court does not consider the rule of law so to be in relation to the plea or defence of insanity when the act of killing is conceded, admitted, or positively proved by the evidence. For every such homicide is presumed in law to be murder until the contrary appears, and every person is presumed to be of sound mind until the reverse is shown, and as insanity must be shown by the party who alleges or sets it up as a defence, it is incumbent and obligatory upon him to establish it as a fact in the case to the satisfaction of the jury. The rule alluded to as we understand it, has relation solely to

the *corpus delicti*, or to the act of killing in the case simply, and if the jury in any case of homicide after maturely considering and weighing all the evidence for and against the accused, entertain any reasonable doubt as to that fact, it is their duty to give him the benefit of it.

Although the indictment is for murder in the first degree only, it is competent for the jury to return and render a verdict of guilty of murder in the first or second degree, or of manslaughter, or of not guilty simply, as the law and the evidence in the case after mature deliberation may in their best judgment seem to warrant and require. Should, however, their conclusion be that the prisoner is not guilty of either offense by reason of insanity, their verdict should so state.

Verdict—Guilty.

THE STATE v. WESLEY ANDERSON.

If death is produced by a deadly weapon, great must be the provocation to reduce the homicide from the grade of murder to the grade of manslaughter.

If two go out to fight, and after one has struck the other a blow with his fist merely, the other recovers his position and draws a knife, or has one drawn to the knowledge of his antagonist, and is near enough at the time to strike him with it, and makes any assault upon him with it, or any motion indicating an intention to strike him with it, and the other in a transport of passion suddenly draws his knife and deals him a mortal blow with it, the provocation will be sufficient to reduce the homicide under such circumstance to manslaughter. But if he did not strike the other at all, or after drawing the knife, he did not strike, or attempt to strike him with it, the provocation will not be sufficient to reduce it to manslaughter, but it will be murder of the second degree.

Kent County, April Term, 1858. At a Court of Oyer and Terminer held at this term, Wesley Anderson, negro, was indicted and tried for the murder in the first degree of James T. Emory, negro, in the month of August pre-

ceding. They had met at the camp-meeting near Camden, and having had a quarrel, Anderson told Emory that if he would follow him off the camp ground he would give him satisfaction, on which they started and walked about a hundred yards from it, when Anderson turned to him and asked him if he had come out there to fight, to which he he replied no, but if he had to fight he could do it, when Anderson immediately struck him with his fist and staggered him back some little, but he recovered and stepped up towards Anderson with both his hands behind him and with a pocket knife in one of them, of which a bystander just then gave notice to Anderson, who exclaimed, putting his hand at the same instant in his pocket, "damn you, if that is what you want, I am ready for you," and drawing a pocket knife from it, made a pass at him with it, but missed him; he then repeated the effort and struck him with the blade of it, inflicting a cut or gash in his left side extending an inch and a half in length. An effort to repeat the blow was arrested by some one seizing hold of his arm, and others interposing they were at once separated. Anderson had his coat off when they left the camp ground, and Emory was drawing his when the knife was first seen in his hand, and just as Anderson struck him with his fist. But the witnesses all concurred in the statement, that Emory did not strike him at all, and that when the cry was uttered that he had a knife, he threw up both his hands and arms before him, and there was no knife then in either of them, and that it was while his hands and arms were so raised before him, he received the cut from Anderson's knife. He walked a mile from there, and was then obliged to lie down under a tree on the road side; a physician was summoned to attend him and for several days found the symptoms of the wound quite favorable, but in about the usual time tetanus ensued of which he died the twentieth day thereafter.

Spruance, Deputy Attorney General, after reviewing the evidence, contended that it would not do to hold that, in

every case of a fight in which one of the parties is killed outright, or mortally wounded, the other must be acquitted entirely, or convicted of manslaughter only. If it be the result of violent and uncontrollable passion under a great and gross provocation, it may be so; but such were not the facts in this case, and it was therefore a case of murder of the second degree under the statute. *Arch.* 388, 389, 392.

Ridgely, (N. B. Smithers with him.) It was a clear case of mutual combat, a mutual agreement to fight, where both parties were equally in the wrong in the eye of the law, and who met on entirely equal terms, except that the deceased was the first to draw a deadly weapon, although both were but ordinary pocket knives such as they and all other men were in the habit of carrying constantly about their persons. It fell therefore clearly within the principle so well ruled and settled in such cases, and was manslaughter only.

Fisher, Attorney General. To reduce the homicide from murder of the second degree to manslaughter, sudden passion, violent anger and excitement, and great provocation to palliate it, must all be proved to the satisfaction of the Court and jury. And in the light of all the facts and circumstances proved before them, what was the provocation in this case to palliate the killing of the deceased?

The Court, Gilpin C. J., charged the jury. It is conceded by the Attorney General that this is not a case of murder in the first degree, and it is admitted by the counsel for the prisoner that it is a case of manslaughter, and they contend that it is nothing more. The Attorney General, on the other hand, insists that it is murder in the second degree.

If the death is produced by the use of a deadly weapon, great indeed must be the provocation to reduce the offense from the grade of murder to the grade of manslaughter. *Arch.* 324. This whole case, therefore, turns on the ques-

tion of provocation. If you are satisfied from the evidence before you, that the prisoner and the deceased left the camp ground and went to the place mentioned, to fight, and that after they reached the point beyond the bridge, and the prisoner had struck the deceased a blow with his fist merely, the latter recovered his position and drew a knife, or had an open knife in his hand, by his side, or behind his back, which the prisoner either saw or knew he had from the admonition of others on the spot, and the deceased was near enough at the time to the prisoner to strike him with it, and made an assault upon him with it, or any motion or movement indicating an intention to strike the prisoner with it, and that the prisoner in a transport of passion suddenly drew his knife and dealt the deceased the mortal blow with it, of which he afterward died, then, in the opinion of the Court, it was a sufficient provocation under the attendant circumstances, about which there is little or no contrariety of evidence, to reduce the offense to the crime of manslaughter, and it would be nothing more. But if, on the other hand, the jury should be satisfied that after the parties went out to fight and reached the place spoken of by all the witnesses, the deceased declined the fight, or did not strike or attempt to strike the prisoner, even after he had received a blow with the fist from him, and although he might have drawn a knife, or had an open knife in his hand, down by his side, or behind his back, and either put it up or dropped it on the ground when the prisoner was apprized of the fact that he had a knife; and either threw up his hands, or otherwise disclosed to him that he no longer had a knife, and made no assault upon the prisoner, and no attempt or effort to use it, or at any time to strike or stick the prisoner with it, and the accused then drew a knife and afterward gave him the cut or stab which caused his death, we are of the opinion that such a state of facts would not constitute a sufficient provocation, under all the circumstances proved, to reduce the offense to the grade of manslaughter; for

where the death is produced by a deadly weapon, as in this instance, the provocation must be great to mitigate the offense so far as to reduce the homicide to manslaughter. As the parties, however, went out to fight and the deceased consented to fight, when they reached the place spoken of, although the jury may be satisfied that he was not eager for it, or as much so as the prisoner, and did not, even after he had received the first blow from the prisoner, strike, or offer to strike him, either with his fist or a knife, or otherwise attempted to injure him, still if he came up to his position again after he had received the first blow which staggered him, or assumed or maintained his attitude as a combatant, we think this state of facts would constitute some provocation for the act of the prisoner, which would be sufficient to negative the legal idea of express malice, and to reduce the offense to the crime of murder in the second degree. In other words, it is the opinion of the Court, that if you find the state of facts to be as we have in the first place supposed them, it would amount to a violent and sufficient provocation, to reduce the killing to manslaughter; but if the facts be as we have in the second place assumed them, then there was some provocation under the circumstances proved, and the angry passions engendered on the occasion, of a nature sufficient to extenuate the homicide to murder in the second degree, but not sufficiently great or violent to further alleviate the killing and reduce it to the offense of manslaughter.

Verdict—"Guilty of murder in the second degree."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* JAMES DONOVAN.

In an indictment for stealing shad it is not necessary to allege that they were dead when stolen, for where a fish or an animal is called by the same name, either dead or alive, it is competent to prove the stealing of it in the dead state without alleging it.

Kent County, Court of General Sessions, &c., April Term, 1858. James Donovan was indicted for stealing two fishes, commonly called shad, of the goods and chattels of John Smith. The proof was that they were dead shad and had been stolen from the fish-cart of the owner who was vending shad from it in town.

C. L. Layton, for the prisoner, objected that on this evidence the indictment could not be sustained, because the fish alleged to be stolen in it were not alleged to be dead

fish, and without that averment the law would import that they were live fish; and yet fish in a river, though not so in a private pond, like animals *feræ naturæ*, are not subjects of larceny. And if not alleged in the indictment to be otherwise, the presumption of law is that they were in their natural state.

The Court stopped the Attorney General, and Gilpin, C. J., remarked that there were three decisions on the point in the English reports, the last of which had ruled that where the animal is called by the same name, either dead or alive, it is competent under such an indictment as this to prove the stealing of them in a dead state; and shad, he believed, had but that one name whether dead or alive.

COURT OF OYER AND TERMINER.

THE STATE *v.* JOSEPH DOWNHAM.

On the trial of a white man for murder his confessions of the crime may be proved by a negro witness.

If the jury believe and are satisfied beyond a reasonable doubt from the evidence that the prisoner killed the deceased as alleged by the State, then conceding all that had been alleged and proved by way of justification, excuse, or palliation of that killing on the other side, it could not show and establish a sufficient provocation in law to reduce it to the grade of manslaughter; for however unreasonable and unlawful the conduct of the deceased had been in refusing to appear at Court according to the tenor of his recognizance, and unfair and unjust as it undoubtedly was to his bail in that recognizance, the prisoner at the bar, and however violent might have been his threats to resist the rightful and lawful authority of his bail, the prisoner, to arrest him and take him to Court on the bail piece which he had taken out of it for that purpose, and whatever attempt he might have made upon the life of the prisoner in shooting at him in his carriage on the road the night before the killing, neither of them, nor all of them combined, could have the effect in law to mitigate and reduce it to the crime of manslaughter, if the act of shooting the deceased was committed by him with a sedate, deliberate mind and formed design, evidenced by his arming himself for the purpose and lying in wait for him, and after nearly, if not quite twelve hours had elapsed since the circumstance last adverted to, the attempt had been made upon his life by the deceased; because such sedate deliberation, formed design and determination to kill another as that, would furnish in itself the strongest evidence of express malice aforethought, and of the crime of murder in law.

Kent County, April Term, 1858. At a Court of Oyer and Terminer, held at this term, Joseph Downham was tried on a bill of indictment found against him at a preceding term of the Court, for the murder of a negro man named Cæsar Lewis in the forest of Murderkill hundred, on the 27th day of October, in the year 1852. He had emigrated from the State and settled in the State of Indiana, not long after the alleged murder, the secret of which had remained unknown to all except two or three persons until very recently, and on the finding of the bill of indictment against him, he had been arrested and surrendered in that and brought to this State on the requisition of the Governor. The indictment was under the statute then in force against the crime of murder, and which was before it had been modified and divided into two degrees in this State.

The first witness called was James Andrews, who testified that a man by the name of John Scott and himself were at work for the prisoner, mauling rails in the Owl's Nest Woods back of his house one morning between seven and nine o'clock, six years ago next October, and during the fall term of the Court here, when he passed right on by them with a gun in his hand into the woods in an easterly direction and disappeared from their view as he proceeded on into the woods. He came back between eleven and twelve o'clock with the gun still in his hand, and going towards his house, and as he passed by them he said to them, "a man has a right to shoot a squirrel in the woods wherever he can find it, aint he?" But he heard no report of a gun while he was gone, and saw him no more after that until about dark that day. He ate dinner at his house about noon, but did not see him then, as he had gone to Dover, so he was informed by some one at the house. It was after supper and he was sitting in his house, and they sat together there and talked some time. After awhile the prisoner said to him that he wanted him to take a walk with him, but he told him he could not, for his wife was sick and he must go home, but the pris-

oner said he must go, and he became alarmed and assented to his demand. After he sat a while longer he stepped into an adjoining room and brought out two guns and said to Pompey Tribbet and to him, "come, I want you to go," and handed him one of the guns to carry as he came out of the house, and he carried it all the way in his hand just as he ordered him, for he was scared from the start by his manner. The prisoner went ahead and they close to him and next Mary Lizzie, the house-keeper, who carried a lantern with her, but not lighted. They went back of the place where they had been at work that morning into the Owl's Nest Woods and stopped within fifteen or twenty yards of the road leading from Whitehall to Berrytown, and within twenty-five yards of Cæsar Lewis' home. They all stopped there. They then went in an easterly direction into the Owl's Nest Woods, the woman still carrying the lantern, not very far, when the prisoner said to him, "hand me that gun," and reached out his hand and took it from him, and then pointing his finger ahead said to him and Pompey to go there and see what that woman can find. They refused to go. He said go on; but they still refused to go, and after he found they would not go, he went ahead himself a short distance and then stopped and said "there is the body of Cæsar Lewis. I want you to take it up and bury it." Pompey said, "I can't until I see who it is before I do." The prisoner said "light the lantern Mary Lizzie, and let him see for himself." She lit it, and Pompey said yes, it is Cæsar Lewis, at the same time looking him right in the face. His body was lying on its back. The prisoner then said take it up and follow him, and they then took hold of it and found it so heavy they could not carry it. He saw his face, but he did not know Cæsar. He and Pompey then got two poles and laid his body across them and carried it, Pompey ahead and he behind, in a southerly direction about one hundred and fifty yards into the swamp, and until they gave out, when the prisoner said he guessed that would do, and that was far enough. The spade was then

given to Pompey and he was told by the prisoner to dig a hole, which he did until he got tired, and then he took hold but soon got tired, when Pompey said don't dig any more, the hole is deep enough. The prisoner sat a few yards off with the gun between his knees, and said put him in the hole and cover him up. He had all his clothes on except his hat. Pompey then covered him up. It was then about ten o'clock. The prisoner then said there is one enemy laid low, and the first one who tells of this may expect to go the same road. He then turned round and started home and they all went back to his house.

On cross-examination he further stated that he did not tell Thomas Jester that he laid in the woods himself waiting for Cæsar Lewis, but told him that he was left in the woods to wait for him about three-quarters of a mile from his house, but that he did not watch for him. He told him he was left to watch for him and lay down by the fence and fell asleep—that was the day before. What he told Jester was that when the sheriff came down there he and the prisoner went along the road and told him to stay there and watch for Cæsar, and he thought he must obey the sheriff's orders, and after awhile he leaned the gun against a bush and lay down and fell asleep and slept till daylight awoke him. The prisoner said Cæsar had shot at him a night or two before and tried to kill him. He said he was afraid to risk his life so long as such a man run at large. He said he had been to Dover and Cæsar watched for him by a large cherry tree, and shot at him in his carriage as he passed, and the shot struck both his hat and the top of his carriage, and it was for that the sheriff was seeking to find him and arrest him. There were shot in both his hat and the carriage-top. They were shot in the night, for he saw them about sunrise the next morning, the morning the prisoner went by them when they were out mauling rails in the Owl's Nest Woods.

Pompey Tribbet was then called and sworn as a witness, and when asked by the Attorney General if the prisoner

had ever told him anything, and if so, what about the killing of Cæsar Lewis?

W. Saulsbury, for the prisoner, objected to the answer, because the witness being a mulatto was not competent under the law of this State to give such testimony against the prisoner, who was a white man. By the law of the State as it stood up to the year 1799, no negro or mulatto, whether free or a slave, was competent to testify as a witness in any criminal prosecution against a white man; but in that year the statute was enacted which enabled such a witness, when otherwise competent, to testify in criminal cases against white men where no white person was present at the time when the act charged was alleged to have been committed. That is the extent of the act, and by the obvious import of its terms it restricts the ability conferred by it to testify to the commission of the offense only when no white person was present at that time, and did not extend it to any other matter or thing relating to the charge, such as a confession for instance, made afterwards by the accused to him. 3 *Harr.* 576, 549, 571.

Fisher, Attorney General. It is an enabling statute in brief, but very broad and general terms, and a free and voluntary confession of the crime made to such a person would come within the spirit and policy, if not the letter of it, as much so undoubtedly, as if he had been the only person present at the commission of it.

N. B. Smithers, for the prisoner, replied.

The Court overruled the objection. The practice had long been settled to admit such testimony. The demands of public justice required the enabling statute to be passed, and it has always received a liberal interpretation in furtherance of that object; and when a crime has been committed in the absence of any witness, and a voluntary

confession has afterwards been made of it, the necessity for the admission of it in the due administration of public justice, is quite as great as proof of the *factum* of the offence itself when it can be had. Besides, if no white person was present when the homicide was committed, we consider the words of the statute broad enough without any forced construction in view of the object of it, to admit the testimony under the terms of it.

The witness then proceeded and stated that four or five years ago last fall, while the Court was in session here, he rode with the prisoner in his carriage from his house to Dover, and that it was after one o'clock in the afternoon when they started, and sometime after they had got on the road leading by White Hall, the prisoner said to him that he had something to tell him—that he had shot the hawk certain. He then asked him what kind of a hawk? He said Cæsar Lewis. He then asked him where? He said partly opposite the house where he lived, and then said he had been sitting for some time in the bushes on the other side of the road waiting for him to come along, and after awhile he saw him coming up the road, and when he got up to near where he was, he rose up in the bushes with his gun in his hands, raised it to his shoulder and levelled it at him in his face, when Cæsar threw up both of his arms and cried out what's the matter? Mr. Downham what's the matter? He said he replied "a good deal's the matter, you love to shoot at white people's heads!" and fired hitting him between and just above his eyes, and he fell dead in the road, and that he then went out into the road and drug him into the bushes and there left him. He said he could not drag him far because he was so heavy. The next day and after Cæsar's body had been buried, he showed him where he was standing in the road when he shot him. It was on the road from White Hall to Berrytown, nearly in front of Cæsar's house, and he then said he was sorry after he fired the gun, and if he had had time

to reflect, he would not have fired it. He then saw blood in the road where he said he shot him, and some in the bushes where his body had been lying. Sand had been swept over that in the road. As they were going back to his house from Dover that afternoon he told him he wanted him to go and help bury him, but he told him he did not want to do it. He asked him why, and he told him he did not want to have anything to do with it. He then said to him it could not hurt him in any way to do that; and he said he had told Mary Lizzie to tell Mr. Andrews to remain there till he got home, for he wanted to see him. He knew Cæsar Lewis well, and it was his dead body certain they saw and buried that night in the swamp. On cross-examination he further stated that two days before he shot him he rode down to his house with his gun in his carriage, and when he saw it he asked what was the matter. At first he said nothing, but afterwards told him that Cæsar Lewis had shot at him in his carriage on the road, and blew his hat out of the carriage, and when he got out of it he saw him run off with his gun behind the carriage into the bushes, that he saw it was Cæsar Lewis, and then cried to him as he ran off that that crack should cost him his life.

The preceding witness, Andrews, was then recalled by the prosecution, and stated that when the prisoner first asked him to take a walk with him that night, his manner was about as usual, but when he said to him he could not go, his manner changed instantly, and the way in which he then said "you must go," both startled and cowed him, and he then stood in fear of him. When the prisoner was afterwards speaking to him of the shooting of Cæsar Lewis, he told him he had been waiting some time in the bushes along the road side not far from his house for him to come along, and when he came along and got near enough, he rose up with his gun to his shoulder and levelled it at Cæsar's head and face, who threw up his arms and cried "Mr. Downham, what have I done!" to which

he said "you have done enough!" and shot him between the eyes. He saw his dead body the night they buried him. It was shot between the eyes and in the forehead just above them, and he saw that night a few shot sticking around the hole which the main load of the gun had made in his forehead. The skull here shown him was taken from the hole where he was buried, and the hole now in the forehead of it is where the wound was the night he was buried. He had on but one boot when he was buried, and but one boot was found in the hole when it was opened by the order of the coroner and the inquest was held over it. There was further evidence produced establishing the identity of the remains disinterred with the dead body of Cæsar Lewis beyond all question.

P. R. Kirby testified that he met the prisoner one day some five or six years ago, when he showed him his carriage and his hat where Cæsar Lewis, as he said, had shot at him, and which looked at the time as if they had been shot, and who then said to him that he intended to shoot him on sight. And that was about the time it was said that the prisoner had been shot at.

John Scott was also called and examined as a witness on the part of the prosecution, and stated that he was at work for the prisoner with the witness, Andrews, five years ago last October, the time spoken of by him, and remembered the fact mentioned by him that the prisoner passed by them where they were at work, with a double-barrelled gun on his shoulder, into the woods beyond them between eight and nine o'clock in the morning; and he also recollected of his coming back by about ten o'clock, and his asking as he passed by them the question, a man has a right to shoot a squirrel in the woods wherever he can find it? But he noticed at the time that he had no squirrel, and he was the more struck with it because he was a good shot, and generally got more game than anybody else in the neighborhood when he went gunning. But he had not been gone more than an hour and a half.

A morning or two before that he had seen where the prisoner's carriage-top had been shot into the night before on the road, as he said, and that same night about ten o'clock he heard a horse and carriage pass by his house and over the bridge towards the prisoner's house, and he thought at the time he knew the carriage by the rattle of it, and said to some of his family there goes Mr. Downham he thought by the sound of his carriage. The horse and carriage were going quite fast, and very soon after they crossed the bridge he heard a gun fired in that direction, and he thinks it must have been near the big cherry tree in Mr. Downham's field. The bridge is about two hundred yards from Mr. Downham's house and about three hundred from his. He saw the carriage the next morning, and it was shot through the side of the top of it about as high as the head of a man of common size when seated in it, and seemed to have been fired into just as the carriage had passed the person who fired into it. The shot went out on the other side of the carriage top higher than they entered it on the opposite side of it.

Edward Reed, the coroner of the county, testified that on the Sunday before the remains were disinterred he took the witness, Andrews, out with him to show him the place where the body had been buried, and when he had done that, he broke a few bushes by it to mark the spot; and on the Tuesday following he took Pompey Tribbett out there to do the same, and when they had reached the broken bushes he at once enquired who had broken them, and asked with some alarm, "but what, if the body has been taken away, and is not to be found here now?" He then told him he had broken them and when, and if the body was not there it should not compromise him. He then said well, it is near the place, and they afterwards found the remains within a few yards of it. The scull was the first part of them unearthed, and in it were found several squirrel shot.

Joseph B. Nickerson testified that five years ago last fall

he was acting as a deputy for sheriff Kersey, and during that term of the Court the prisoner called on him to go and arrest Cæsar Lewis, for whom he was bail at that term of the Court. The sheriff could not go and he came for him. He told him he would go, if he would give him five dollars, but as he was his bail for his appearance at that term, he had a right to arrest him and bring him himself, and as he would not give him the five dollars, he did not go. He showed him his hat which had been shot, and which he said had been done by Cæsar Lewis he believed. It was a black silk hat, and it was shot in the back part of it, the shot inclining upward and the lowest shot in it which he measured with his finger, seemed to have entered it about two inches and a half above the rim. Some of the shot passed out towards the top of the hat, and some out through the top of it. He said Cæsar Lewis shot at him and did it the night before that, as he was driving home from Dover.

The counsel for the prisoner then opened their defense, and put in evidence the record of an indictment found as the April Term, 1852, of the Court of General Sessions for the county, against Cæsar Lewis for cutting trees, and respited until the following October Term, with Joseph Downham as his bail for his appearance at that term.

Henry Todd was then sworn and testified that he remembered that the prisoner came to him as Clerk of the Peace at the October Term, 1852, for a bail piece for the purpose of arresting and surrendering Cæsar Lewis, for whom he was bail on the indictment referred to, and who had failed to appear at that term, and he gave him a duly certified copy of the recognizance of bail, and he heard Chief Justice Booth tell him after he had delivered it to him, that it would authorize him as his bail to take him and bring him into Court. He had not been shot at then, but he came back the next day in the afternoon, and he then exhibited his hat, which he saw had been shot through, and stated that it was done by Cæsar Lewis. His recol-

lection was that he got the bail-piece during the forenoon of Tuesday and was back again in the afternoon of the next day.

William Harrington was next sworn and testified that he was a Justice of the Peace, residing in that section of the county during the year 1852, and that during the fall term of the Court here in that year Cæsar Lewis came to his house one night and wanted a State warrant against Joseph Downham and also a State warrant against one Thomas Cook, and his complaint was that they had laid violent hands on him and attempted to tie him. He was aware of the nature of the case, and at once told him he could not issue them, because he ought to have gone to Court, as he was bound by his recognizance to do, and that he had advised Mr. Downham to do as he had done, as he was his bail and surety for his appearance at Court. He was very much dissatisfied and then said if he could not protect him, he would have to defend himself, and it must be life for life, and that he would not be taken to Dover alive. He said they had been trying to tie him to carry him to Dover to be tried, and that he had just got away from them. It was the night of the first or the second day of Court, and it was about one o'clock when he came to his house, and remained about an hour. He saw the prisoner the next or the second day after that, and he seemed to be alarmed, but did not remember whether he informed him of the threats he had made or not.

Thomas Winter also testified that Cæsar Lewis told him on the Saturday evening before the meeting of Court that he would not go to Court. He told him he ought to, for his surety by entering his bail, had kept him out of jail. He said he would suffer death, and that he would shoot him dead before he would go; and in a few days afterwards he heard that they had their fuss.

Thomas Cook testified that the same night the prisoner was shot at, he went with him early in the evening to

Cæsar Lewis' house to persuade him to go to Court the next day if they could, and if not, to arrest him and take him there if they could, but as soon as they entered his house his wife opened the back door and told him to run, which he immediately did, but they pursued him, and as he fell down over a stump, they overtook him and got hold of him, but his wife came out with a stick, when the prisoner went to take it from her, and Cæsar broke away from him and escaped from them. He went there with the prisoner in his carriage, hitching the horse some distance from the house. He had no gun in the carriage with him. He then rode back in the carriage with him as far as Mr. Bell's, where he got out, and the prisoner drove on towards his home. After they had separated and before the prisoner had had time to reach home, he heard a gun fired. It was about three-quarters of a mile from the White Hall road to Cæsar's house, and he had run down the road in the direction of that road.

The counsel for the prisoner, in conclusion, called a large number of the most respectable citizens who had been well acquainted with him for many years, all of whom represented his reputation for peace and good order as having been uniformly unexceptionable.

The case was fully and ably tried on behalf of the State by *Spruance*, Deputy Attorney, and *Fisher*, Attorney General, and on behalf of the prisoner by *W. Saulsbury* and *N. B. Smithers*.

The Court, Gilpin C. J., charged the jury with equal fullness and ability on the law of the case, defining the law of self-defence, and the three several grades of felonious homicide, that is to say, murder with express malice aforethought, murder with malice aforethought implied by law, and manslaughter; and in effect that if they believed and were satisfied beyond a reasonable doubt from the evidence that the prisoner killed the deceased, the negro

man, Cæsar Lewis, in the mode and manner alleged and contended for by the State, then conceding all that had been alleged and proved by way of justification, excuse or palliation of that killing on the other side, it could not show and establish a sufficient provocation in law to reduce it to the grade of manslaughter; for however unreasonable and unlawful the conduct of the deceased had been, in refusing to appear at Court according to the tenor of his recognizance, and unfair and unjust, as it undoubtedly was, to his bail in that recognizance, the prisoner at the bar, and however violent might have been his threats to resist the rightful and lawful authority of his bail, the prisoner, to arrest him and take him to Court on a bail-piece which he had taken out of it for that purpose, and whatever attempt he might have made upon the life of the prisoner by shooting at him in his carriage on the road the night before the killing, neither of them, nor all of them combined, could have the effect in law to mitigate and reduce it to the crime of manslaughter, if the act of shooting the deceased was committed by him with a sedate, deliberate mind and formed design, evidenced by arming himself for the purpose, and by lying in wait for him, and after nearly, if not quite twelve hours had elapsed since the circumstance last adverted to, the attempt had been made upon his life by the deceased; because such sedate deliberation, formed design and determination to kill another as that, would furnish in itself the strongest evidence of express malice aforethought, and of the crime of murder in law.

Verdict—"Not Guilty."

THE STATE *v.* MARTIN O'NEAL, GEORGE CAMPBELL, JAMES CUSICK and EDWARD BRADY.

In a fight between two persons, the use by one of a billet, a formidable implement heavily loaded with lead in the end, will constitute such a provocation as will excuse the other in drawing a knife and stabbing him fatally with it, and will reduce the killing to manslaughter. Where several were engaged in the assault upon the deceased, it is sufficient to prove that any one of them inflicted the fatal wound, although it is alleged in the indictment that the one named inflicted it.

New Castle County, May Term, 1858. At a Court of Oyer and Terminer held at this term, the prisoners were indicted and tried for the murder of Jesse Jones in the first degree. On the 25th of February preceding, the night on which the homicide was committed, there had been a serenade at a late hour on Third Street, in the City of Wilmington, after which the prisoners and the deceased were together in the house of James Cusick, one of the prisoners, which was near that of the deceased on Orange Street, when the deceased who was intoxicated, though not very drunk at the time, was ordered out of it by Cusick, to which the deceased replied that they ought not to impose on him more than any of the rest, and that there were not men enough in the house to put him out of it. Although a very stout and athletic man, he was then pushed out of it upon the pavement and into the street, after which the parties were all again met in the house, when O'Neal was heard to inquire "where is the knife," or to say "here is the knife." Soon after a fight was heard on the street between the houses of Cusick and the deceased, and when the witnesses of it arrived on the scene, the deceased was in a stooping position, with his body bent forward and his head against the stomach of Brady, who had hold of him, while O'Neal was behind him with his left hand upon his back and was seen with a knife glittering in his right, to stab him three times in the back part of his body as he stood behind him. Campbell also at the time was participating in the assault with them upon the deceased, whilst Cusick was standing on the pavement fifteen or

twenty feet from them. As they were leaving the deceased he exclaimed that he was stabbed, and taking a few tottering steps towards his door, fell heavily upon the pavement and spoke no more. He had in his right hand when the fight was terminated, a billet six inches long with a half-pound of lead in the head, covered with blood and which was found firmly grasped in his hand ten minutes after his death. There were four penetrating wounds inflicted with a sharp pointed weapon or instrument, found on examination of his body, one in the lower part of his back and three in his left thigh, of the depth of five inches, one of which had divided several branches of the internal artery of it, whilst several of the branches of the *arteria profunda* were also entirely severed by the one in the lower part of his back, which were proved to have been sufficient to produce his death in so short a time. The parties were all white men except the deceased, and had been drinking to excess during the night.

The Court, Gilpin C. J., charged the jury, That they had been relieved in the consideration of the case to some extent, by the admission of the Attoreny General that it could not, under all the facts and circumstances proved, constitute on the part of any of the prisoners at the bar, the crime of murder in the first degree under the statute; and after defining express and implied malice and murder in the first and second degree, added that where the homicide or killing, as charged in the indictment is proved, the law presumes that it was committed with malice, until the contrary appears upon the proof produced on the trial, but it goes no further than to imply malice, and therefore the legal presumption goes no further in such a case, than that it is murder in the second degree under our statute. He next proceeded to define the crime of manslaughter and to distinguish it from murder in the second degree under the statute, and that it would be for them to determine, from the evidence before them, what provocation, if any, the deceased had given

the prisoners, or any of them, for the violent attack made and the mortal wounds inflicted upon him by them, or any of them, as detailed in the evidence. For the prisoner, Cusick, in order to remove the deceased from his house, had no right after ordering him to go out of it, as was proved on the occasion, to resort to any greater force than was actually necessary for the purpose of putting him out, and if the other prisoners were aiding and assisting him in the effort, they would have no other right or power than he had for that purpose, and therefore they would not be justified in using any force, or in making any assault upon him after he was removed from it; but if they did so, the killing under such circumstances, would be murder in the second degree under the statute, unless they were satisfied by the evidence that there was great provocation given to them by the deceased, in which case it would be but manslaughter at common law and in contemplation of the statute. Great provocation, however, must be proved in such a case, as the fatal wounds were inflicted with a deadly weapon. There was some proof before them that the deceased had a billet on the occasion, a formidable implement heavily loaded with lead in one end of it; and if there was proof to their satisfaction that he used or employed it in the fight against them, and thus gave the accused, or any of them, a provocation and an excuse for drawing and using in the combat a knife upon him, it would under such circumstances, constitute such a provocation and excuse, as would mitigate and reduce the crime to that of manslaughter. That, however, should be shown to their satisfaction, or it would be murder in the second degree in each and all of them who were at the time the mortal wounds were inflicted, involved and engaged in the fight and were aiding and assisting in it the party who inflicted them. For although the indictment alleges that O'Neal inflicted the wounds, and the other prisoners were his accomplices in the homicide, if the jury were satisfied that any one of them inflicted them, it was sufficient for the conviction of all who were aiding and assisting him in

the combat, because in contemplation of law it became the act of all and every one who were engaged and participating with him in the perpetration of the crime committed on the occasion. Any one or more of the prisoners may be convicted, and the others acquitted under it, according as the evidence may justify and warrant it in the judgment of the jury.

Verdict—O'Neal and Brady guilty of murder in the second degree, Campbell guilty of manslaughter, and Cusick not guilty.

Fisher, Attorney General.

Booth, for the prisoners.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* BENJAMIN SLOANAKER.

If a party wantonly and recklessly discharges a loaded pistol into a crowd or group of persons casually collected on the arrival of a train at a railroad station, regardless of whom he may wound or kill by it, and wound one entirely unknown to him, on an indictment for an assault with intent to kill such person, he will be presumed in law to have intended the probable consequences of his own act under such circumstances, and will be guilty of an assault upon him, but not of the intent to kill him without proof of such felonious intention like any other material fact in the case.

New Castle County, Court of General Sessions, &c., May Term, 1858. The indictment was for an assault and battery committed by the prisoner on James Brown with intent to kill him. On the evening of the 25th of August preceding, upon the arrival of the train on the railroad at Claymont Station, Mr. Brown had just left the

train and taken his seat in his carriage, when a pistol was discharged from the platform of one of the cars, the ball from which hit and penetrated the right side of his face, from which it was afterward extracted, but inflicting a wound which was at one time considered to be dangerous to his life. There were some twenty persons on the platform of the station when the prisoner, who had just before been seen standing with another young man on the platform of a car with a pistol in his hand apparently examining it as the train was starting and had partly passed Mr. Brown's carriage, suddenly brought his arm and hand with the pistol in it, around in that direction and discharged it. They were both strangers to Mr. Brown, and were on their journey together from Philadelphia to Dover, to work at their trade as carpenters for a person who had employed them there. The companion of the prisoner was the owner of the pistol, and in packing his chest in the city had forgotten it until it was too late to be packed, and on leaving had put it in his pocket, and had informed the prisoner of it about the time the train reached the station, and told him he did not like to be carrying a pistol in his pocket, when the latter expressed a desire to see it, and he handed it to him for that purpose, as they went out on the platform of the car. He further testified that the prisoner was examining it when he accidentally and unintentionally discharged it, and that the prisoner did not know that it was loaded until it went off. When a gentleman on the train, who had no acquaintance with the prisoner, went to him soon afterward and told him that it was rumored on the train that a man had been shot by him, he replied insolently to him and said, if he had done it, he did not know that it was any of his business; and after the train had reached Wilmington, he again spoke to him about it, when he replied that he did fire a pistol in that direction, but if any one said he fired at anybody, or tried to shoot anybody, he was a liar and he would whip him, although he was not a fighting man. They were followed by officers to Dover the same night

and when arrested together in the same bed, they both said to the officers arresting them, they had got hold of the wrong parties, and when asked for the pistol, denied that they had any, but on turning back the bed clothes and pillows, they found one under them. The prisoner had since called on Mr. Brown in Philadelphia and said to him that he was the man who did it, and that he was sorry for it.

Spruance, Deputy Attorney General, asked the Court to charge the jury that if they were satisfied from the evidence that the pistol was recklessly discharged by the prisoner into the crowd of people then and there assembled, and particularly in such a place, regardless of its effects, or whom he might wound or kill, it was a case of malice generally against all of them, and was sufficient to sustain the felonious intent alleged in the indictment to kill the person wounded by it, although he might have been an entire stranger to the prisoner at the time, and the latter might have had no individual or actual malice against him.

Gordon, for the Prisoner. The felonious intent to kill must be proved in this, as in every other case, like any other material fact in it, and it was incumbent upon the State to establish it. But if the pistol was accidentally or unintentionally discharged by the prisoner on the occasion, it was a case of misadventure in contemplation of law, and would be a good defence even to the misdemeanor or the assault simply, although it would be no defence in such a case in a civil action for the trespass.

The Court, Gilpin C. J., charged the jury, That if they were satisfied that the pistol was fired by the prisoner unintentionally and by accident merely, however imprudent, or improper it may have been for him to be handling or examining it loaded in such a place and at such a time, he ought not to be convicted of either the misdemeanor,

or the felonious intention alleged in the indictment. But if, on the contrary, they were satisfied by the proof that he discharged it intentionally and wantonly or recklessly into the crowd of persons assembled about the place at the time, or in the direction of the carriage of the prosecuting witness, indifferent as to whom he might shoot, or what the mischief or injury might be, or where or on whom it might fall, such conduct would manifest such a wicked and depraved inclination and disposition on his part, that it might well be presumed by them that he intended at the time to shoot some one, upon the principle that every one is presumed to intend the probably consequence of his own act; and if that was so in the opinion and belief of the jury, the prisoner was guilty, at least of the assault alleged in the indictment. But the felonious intention alleged in it to kill the prosecuting witness, Mr. Brown, was not a matter to be made out by inference, or presumption merely, but must be proved like any other fact material in the case, in order to convict him of the felony, or felonious intention alleged in it, and the point had been several times so ruled and decided in this court. It was competent under the statute, however, for the jury to convict him upon the indictment of the misdemeanor, or assault merely. But as to the felony, of intent to kill the prosecuting witness, it would have been a very different case both in law and fact, if he had died of the wound within a year.

Verdict—Not Guilty.

COURT OF OYER AND TERMINER.

THE STATE v. REUBEN NEWCOMB.

In order to reduce homicide in self-defense to such a degree as to render it entirely excusable or justifiable in law, the jury must be satisfied from all the evidence in the case, that the prisoner was in imminent and manifest danger of losing his own life or of suffering great bodily harm at the hands of the deceased. Even in such cases the law requires the party assailed to retreat as far as he conveniently or safely can to avoid the violence of the assault, before he resorts to such extremities, or as far as the fierceness of the assault will permit him, for it may be so fierce and so imminent as not to allow him to yield a step without manifest danger of losing his life or of suffering great bodily harm, and then he may kill his assailant instantly.

Kent County, October Term, 1858. At a court of Oyer and Terminer held at this term, Reuben Newcomb was indicted for the murder in the first degree of Ezekiel C. Cook, and was tried in the said court on the 28th day of December following.

The deceased had been an adjoining neighbor of the prisoner and having become very much offended with him had several times declared to others his intention to whip him, and his desire to kill him, to which the prisoner had rejoined on the same being communicated to him by others, that he would defend himself, if he was attacked by him, and that he would consider it as proper to kill such a man if attacked by him, as to kill a mad dog under

the like circumstances, and from that time carried a six barrel revolver about his person. The deceased on the day of the homicide was in his store at Blackiston's Cross Roads, about the hour of sunset when he was seen by the only other person then in it to go around to a drawer under the counter and take a pistol from it and put it in his pocket, and said he was going to shut up his store, and closed the windows, the prisoner at the time standing in his front yard some forty feet from him, at whom he looked and then said to the person still in the store, but who was in the act of leaving it, that he would "kill that man, if he was the last man in the world, and a d—d nigger too." Just then the prisoner passed the store, walking down the street, and soon afterward the deceased closed his store and walked rapidly in the same direction on the opposite side of it, until after he had overtaken and passed him, with a pistol in his hand when he crossed over to the same side in advance of him, and quickly turning stood face to face a few yards in front of him. Both halted, and the deceased was immediately seen to throw up his right arm and hand towards the prisoner, and a pistol cap was both seen and heard to explode between them. The prisoner then discharged four barrels of his revolver in quick succession at the deceased who after taking a few steps tottered and fell in the street, and as the prisoner passed him in the act of falling he was heard to say to him, "I told you, you would catch it!" A single barrelled pistol was found on the ground by the side of the deceased when he was taken from the street, and he died within fifteen minutes after he was removed from it to his house. One bullet passed through his body from the right to his left side.

Fisher, Attorney General, contended that it was a case of manslaughter, at least, for the testimony clearly showed that there was enmity and malice on both sides, and although the prisoner had not sought or courted the conflict, both his previous declarations and his conduct

had shown no temper or disposition to shun or avoid it, or to recede or retreat a step from it when he saw and knew that it was approaching. His declarations almost warranted the belief that he was not only ready to avail himself of the first hostile approach towards him to discharge the contents of his pistol into the body of the deceased, but that he was even coolly and carefully waiting for the very first opportunity or a plausible pretext for shooting and killing him. The cruel and exulting taunt with which the prisoner insulted the deceased as he fell exhibited the animus with which he shot him. But the jury should be satisfied from the evidence that it was not to gratify any feeling of enmity, hatred, animosity or revenge against the deceased that the prisoner killed him, but solely in defense of his own life, or to save himself from some great bodily harm which he could not have escaped or avoided in any other manner, or they would be bound to convict him of the crime of manslaughter.

N. B. Smithers, for the prisoner, admitted that the jury must be satisfied that the prisoner killed the deceased in self-defense, and that under the circumstances it was reasonably necessary for him to do what he did in order to save his own life or person from the imminent peril in which it was then placed by the deliberate and deadly attack of the prisoner. But in no event could it be made out a case of murder at common law, or of either degree under the statute. He would cite but one authority on that point, which would be sufficient on that question. If A challenges B to fight, and B declines the challenge, but tells A that he will not be beaten, and if attacked, will defend himself and afterwards A attacks B and in the assault kills him, it will be murder in A. But if B had killed A in the assault, and could not have otherwise escaped, it will be excusable homicide, but if he could have escaped and did not, it will be manslaughter merely. 1 *Russ. on Crimes*, 662. This was but a stronger case for the reason that there was no challenge given, for the attack and de-

sign to kill though often threatened and long contemplated, was not accompanied with any such formal notice to the prisoner to be prepared for it. It was not necessary to recapitulate the evidence for it was all fresh in the minds of the jury, particularly as to the place and the character of the attack, suddenly confronted on the public highway, without the ability to shun or avoid him, to recede or retreat from him, no wall, no house, no means whatever of escape from him, with his right arm uplifted and his pistol in hand levelled and once already snapped directly at him, the prisoner was unquestionably in the most imminent peril of being instantly shot down by him, and evidently the only resource left him to save his life under such circumstances was to shoot him down as speedily as possible.

The Attorney General replied.

The Court, Gilpin C. J., charged the jury. It was not contended on behalf of the prosecution that the case could constitute in contemplation of law on the facts proved any offense above the grade of manslaughter, while it is insisted by the counsel for the prisoner that it is a case of excusable homicide, or of killing in self-defense. In this case there had been no previous combat or fight between the prisoner and deceased, but it seems a deliberate and violent assault was made by the deceased upon the prisoner on the public highway with a deadly weapon, or a pistol, and that the latter at once resorted to a similar weapon to repel the attack and to defend his life, as he alleges, and shot and killed the deceased. In order to reduce homicide in self-defense to such a degree as to render it entirely excusable or justifiable in law, the jury must be satisfied after considering all the evidence in this case, that unless the prisoner had killed or shot down Ezekiel C. Cook, as he did in this case, he was in imminent and manifest danger of losing his own life, or of suffering great bodily harm at his hands, and that it was

done not of malice, but of necessity by him for that purpose. Even in such cases the law requires the party assailed to retreat as far as he conveniently or safely can to avoid the violence of the assault before he resorts to such extremities, or as far as the fierceness of the assault will permit him, for it may be so fierce and so imminent as not to allow him to yield a step without manifest danger of life or great bodily harm, and then in his defense, he may kill his assailant instantly. The jury must be satisfied from the evidence that the shooting of the deceased was necessary under the circumstances to protect the prisoner's life, or to protect him from such serious bodily harm as would give him ground for a reasonable apprehension that his life was in immediate danger, or it would be their duty to find him guilty of manslaughter.

Verdict—Not Guilty.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* WILLIAM LIVINGSTON.

On an indictment for stealing a clock from the trustees of a church incorporated according to the provisions of the general statute, and so proved on the trial, it is sufficient to prove who were the trustees of it at the time of the larceny without producing the record of any other than the original election of trustees under it.

Court of General Sessions, &c., Sussex County, April Term, 1859. At this term, William Livingston was indicted and tried for stealing a clock of the trustees of Zoar Church, which was duly and formally proved to have been incorporated in the year of 1810, by the election, certifying and recording of seven trustees thereof pursuant to the provisions of the general statute for the incorporation of religious societies or congregations of christians, by the election of trustees to hold all the real and personal property of such societies. There was no proof on the trial, however, of any election subsequent to that time to

supply the places of any of the seven trustees originally elected and who had in the meantime died, or otherwise vacated their offices, although the fact was proved that there were seven trustees of the church in office, and who constituted the seven at the time when the clock was stolen from the church.

Objection was taken at the trial that as the best evidence the records of the church and of the trustees should have been produced to prove the regular election and succession of the trustees of the church since 1810, and particularly of the election of those in office when the clock was stolen.

The Court, Gilpin C. J., charged the jury, That the act of Assembly in the case only required the original election of the trustees in 1810, to be certified and recorded in the public office of the Recorder of Deeds for the county, and that having been proved by the production of the record, the Court considered the evidence from the witnesses at the stand that the persons named were the seven trustees of the church, and were acting as such at the time when the larceny was committed, was sufficient to sustain the indictment in the absence of any proof to the contrary.

THE STATE *v.* MARY OWENS.

On an indictment for aiding the escape of an indentured servant from her master, the omission to insert her name in the binding clause of the indenture, will not be fatal, if it appears in the *habendum*, and other parts of the indenture.

Court of General Sessions, &c., Kent County, April Term, 1859. At this term Mary Owens (n.) was indicted for aiding the escape of an indentured servant girl from her master. She was the mother of the girl and had bound her to the master by an indenture of servitude executed

in the presence and with the approbation of a Justice of the Peace; but on the production of the record it appeared that the name of the servant had been omitted and left in blank in the binding clause of it, although it was inserted and appeared in the *habendum* and other parts of the indenture.

And on that ground it was objected that the indenture was invalid and a nullity, and that the defendant could not be convicted.

The Court, Gilpin C. J., charged the jury, That the accidental omission of the name of the servant in that clause of the indenture, was not a fatal defect and was sufficiently understood and supplied in the *habendum*, and all other parts of it in which it appeared, and that it was not a defense against the indictment, which was a misdemeanor merely.

COURT OF OYER AND TERMINER.

STATE v. MARY E. BURROWS.

On the trial of an indictment for arson the legal title to the premises is not in issue, and therefore the production of the deed for them is not required as the best evidence of the ownership of them, it being sufficient to prove that the dwelling house burnt was occupied at the time by the person whose dwelling house it is alleged to have been in the indictment.

Kent County, April Term, 1859. At a Court of Oyer and Terminer held at this term, Mary E. Burrows, negro, was indicted and tried for arson in setting fire to the dwelling house of Naomi Burrows, negro, in Murderkill hundred, who was the step-mother of the prisoner, and the first witness examined, and who after stating that she owned the house and the lot on which it stood, and then lived in it, she was asked the question by the counsel for the prisoner if she had a deed for it, to which she replied that she had.

Comegys, for the prisoner, then objected to the admissibility of her evidence on that point, because the deed should be produced as the best evidence of her ownership of the premises.

The Court. The legal title to the premises or the house burnt is not in issue in the case, but it is sufficient to

prove that it was occupied at the time as the dwelling house of the person whose dwelling house it is alleged to have been in the indictment. The objection is therefore overruled.

She then resumed and stated that the prisoner did not live with her, but that she came to her house that day, and she told her that she could not stay there, and she saw by her manner that she did not like what she had said to her, but she did not then leave there. After that she told her she was going to Stephen Jackson's to stay all night, and when she had fastened up the house they both went out to the road together and they there parted, she going toward Jackson's, and the prisoner another way. She staid there all night, and returned next morning when she found her house burnt down. It was then proved that the house had been broken open, set on fire and burnt down that night. A Justice of the Peace then testified that the prisoner had been arrested and brought before him on the charge of having feloniously set fire to and burnt the house, and on the hearing made a voluntary confession before him, which he reduced to writing at the time, read over to her, and which she voluntarily signed, that she and a mulatto man named John broke open the house and stole the old woman's clothes, and that he then told her to set fire to the house, but she told him she was afraid, and did not like to do it; that he then told her it would be better for her to do it, and she then took fire from the fire-place and set fire to it. And another witness testified that he afterward heard her make the same confession voluntarily to another person.

For the prisoner, however, it was proved by several witnesses who had known her from her early childhood, that she had always been of a very weak and imbecile mind and intellect, and on one occasion had confessed the stealing of seventy-five cents she was charged with which in a few minutes afterward it was discovered had not

been stolen at all; and although there was testimony to the contrary, as to her mental capacity and intelligence afterward produced in reply on behalf of the State, the Court left the question raised by it to the jury who returned a verdict of not guilty.

THE STATE v. SAMUEL TURNER.

In a trial for rape the prosecuting witness cannot be asked the question if she had not had sexual connection with another person prior to the commission of the alleged offense in question.

Nor is one who had been convicted upon her testimony at the preceding term of the Court of a rape committed upon her at the same time in company with the prisoner, a competent witness for the prisoner on the trial of his case, although she has acknowledged that she committed perjury as a witness in the preceding trial.

New Castle County, May Term, 1859. At this term Samuel Turner was indicted in the Court of Oyer and Terminer for rape on Jane Norris, and upon her examination as a witness for the State,

Rodney, for the prisoner, asked her the question whether she had not had sexual connection with Alexander Robinson previous to the time when the alleged crime in question was committed upon her.

Fisher, Attorney General, objected to the question, because it was both immaterial and inadmissible.

N. B. Smithers, for the prisoner, contended that the question was admissible and the evidence designed to be obtained by it was both pertinent and material in such a case. *Ros. Cr. Ev. 96. People v. Abbott, 19 Wend. 192.* We propound it not for the purpose of impeaching her general character for veracity, but with the view to contradict her as to this fact, and because, if it was so, it goes to the

very gist of the matter now in question, since it is not so likely that a lewd woman or a prostitute would refuse her assent to such intercourse, as a woman of undoubted virtue would.

The Court sustained the objection and excluded the question. The correct rule in regard to the matter, and which has been uniformly recognized in this State, and so far as we are informed in every other, except in New York and North Carolina, and some doubt which may have been suggested against the propriety of it perhaps, in a recent case in England, will be found stated in 3 *Greenl. Ev. Sec. 214*.

The witness was then asked the question whether she had not said in the course of her examination as a witness for the State on the trial of Alexander Robinson for a rape alleged to have been committed upon her at the same time this rape was alleged to have been also committed upon her by the prisoner, that she had never had sexual intercourse with any man, or with Alexander Robinson, previous to the time of the rape which, as she alleged, was committed by him upon her in company with Turner.

The witness answered that she had made such a statement when under oath and examination as a witness in that case, but what she had then said was not true, she added, however, that she had been informed before that trial that she was not bound to say anything about that matter upon that trial, but only to tell what had occurred on the night of the rape.

Rodney, in the next place, proposed to call Alexander Robinson who had been indicted, tried and convicted at the preceding term, for a rape committed at the same time in company with the prisoner upon the witness, and to examine him as a witness for the prisoner in the present case.

Fisher, Attorney General, objected to his competency as a witness in the case. He was prepared to admit that the late statute had removed the objection to his competency on the score of infamy consequent upon his conviction of the crime in the case referred to. But there was another and still subsisting ground of objection to it, not removed or affected by the enabling statute to which he had referred, which was that he was an accomplice, or a *particeps criminis* with the prisoner in the commission of the crime for which he was now on trial.

The Court held the latter objection to be good and on that ground rejected the witness.

The case afterward went to the jury and the prisoner was convicted.

The Counsel for the prisoner, afterward during the term and within the time prescribed by the rule, moved for a new trial, first on the ground that Jane Norris was the only witness that proved the commission of the alleged offense, and had since acknowledged that she had committed perjury on the previous trial of Robinson for a like crime alleged to have been committed upon her by him at the same time, and secondly, on the ground that the prisoner should have been allowed to produce Robinson as a competent witness in the case, and that he was improperly excluded from testifying by the Court, but which motion the Court after a hearing overruled.

THE STATE v. GEORGE W. BUCHANAN.

The Court is, and always should be, cautious in admitting what are termed dying declarations in evidence, and will not admit them without being satisfied that they were not made, until after all hope of ultimate recovery had been abandoned by the deceased.

Inasmuch as the recent statute in relation to murder and manslaughter employs familiar terms with reference to them, of fixed legal import at common law without any definition or qualification of their meaning, it must be understood to use them in the same sense in which they are employed at common law.

And therefore express malice aforethought which constitutes the essential ingredient of murder in the first degree, as provided for in the statute, means express malice aforethought at common law, and as it was recognized and understood in this state prior to the passage of the act.

And although it further provides that every person who shall commit the crime of murder "other than with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death," shall be deemed guilty of murder of the second degree, without the use of any terms to define or ascertain the meaning of the provision, except "otherwise" than with express malice aforethought, &c., as before mentioned, it must be understood to mean with malice aforethought implied by law in contradistinction to express malice aforethought, as the crime of murder cannot be committed at common law without either express malice aforethought, or malice aforethought implied by law.

The two kinds of malice aforethought, and the distinction between them at common law, and between murder of the first and murder of the second degree under the statute, and between them and the crime of voluntary manslaughter defined.

A mortal wound suddenly inflicted by a briar scythe in the hands of the accused upon the party killed in an angry and personal collision between them, if done intentionally without sufficient provocation to reduce the killing to voluntary manslaughter, will constitute the crime of murder committed with malice aforethought implied by law, and murder of the second degree under the statute; but if not done by him intentionally, it will constitute no offense under the statute.

New Castle County, May Term, 1859. At a Court of Oyer and Terminer held at this term, George W. Buchanan, was indicted and tried for the murder of David

S. Casperson in the first degree. The prisoner and the deceased owned and resided on adjoining farms in Appoquinimink hundred, a portion of the divisional boundary of which was in dispute between them. On the 15th day of April preceding the prisoner had several men employed in erecting a fence upon it, and was himself engaged with a briar scythe in cutting briars near the line on his side of it, when the deceased came across his land up to the fence, where they were at work, and in a rude and excited manner asked the prisoner what he was putting up the fence there for, and said to him that if he put it up, he would take it away; to which the prisoner replied that if he did, he would put it up again. Further words ensued between them in regard to the matter, characterized by anger and profanity on the part of the deceased, when the prisoner told him to go away and to go home, as he did not want to have anything to do with him, and resuming the use of his scythe upon the briars, forewarned him against coming on his premises, on which the deceased jumped over the fence and said to him, "damn your premises, here I am, and you can't help yourself?" The prisoner who was then from twenty to thirty feet from him, stepped rapidly towards him with the scythe in his right hand and the blade of it just above the ground, while the deceased made one or two steps toward him, and as they came together face to face, the prisoner gave a quick short jerk to the scythe inflicting a deep cut in the calf of his right leg and severing two of the main nerves, and the small bone of it. The latter then seized hold of him and the handle of the scythe when the prisoner gave it another short jerk higher above the ground, which inflicted another severe cut in the left thigh and groin of the deceased, who then gave way and fell to the ground across and upon the blade of the scythe. He was soon afterwards removed to his home, and a physician sent for who testified that he reached his house about nine o'clock that morning, and found that he had lost a great deal of blood and was almost pulseless, and that he com-

plained of a great deal of pain in the groin. He described the two wounds; the only ones received, and expressed the opinion that the cut in the calf of his leg was a mortal wound, and the cause of his death, and would have produced it, if he had not received the other. The cut in the thigh and groin was not a mortal wound of itself, although he considered and believed that it contributed with the other by the shock to his nervous system which accompanied it, the irritation which it excited, and the mortification which followed the wounds in the calf of the leg and could not be prevented, to produce his death. Another physician testified that he was called to see him two days afterwards, and found him very much prostrated, and his right leg from the knee down in a state of mortification, and thought from that time he would die, and that there was scarcely a hope of his recovery. All was done for him that could have been done in the medical science to save his life, and he knew of nothing that could have saved his life; amputation could not have done it. His whole appearance then was cadaverous and death-like, and he was suffering from great prostration.

In addition to the preceding evidence it was proved that although he lingered and did not expire until several days afterwards, the deceased had from the first day expressed his belief that he must die of the wounds received; but it was also proved that three or four days after he had been wounded he enquired of a friend on a visit to him what he thought of his condition, and who told him he must die, and that up to that time his attending physician, of whom a similar enquiry had in the mean while several times been made by him, had encouraged the hope of recovery on his part, but on being asked the question after that time by him, made no reply to it.

And on this proof being made the state proposed to put in evidence certain declarations subsequently made by the deceased that the wounds were inflicted upon him by the prisoner, and the manner in which he did it, but which was objected to by the counsel for the prisoner.

The Court, Gilpin, C. J. The Court had been and should always be cautious in admitting what were termed dying declarations in evidence, as such declarations were often made in critical danger of death, and in a state of apprehension and despondency, before all hope or expectation of ultimate recovery had been entirely abandoned by the person making them, but as far as the testimony had gone on this subject, the Court did not feel satisfied on that point, and must therefore exclude the evidence offered.

The defense then proceeded and proved that the fence which the prisoner was at the time having erected, was on the boundary line between the two farms, on which a division fence had previously stood for more than twenty years, and that the deceased had only a short time before taken down and carried away the rails of a former fence erected by him in the same place, and that the deceased had declared with an oath that he would kill Buchanan, or Buchanan should kill him before a fence went up there to stand, and had sent a message to him by a neighbor that if he did not quit aggravating him about that little piece of land, he would kill him. The defense also proved by numerous witnesses the good character and peaceable disposition of the prisoner.

The only question of fact involved in the case was whether either of the wounds was inflicted by the prisoner directly, and if so, whether intentionally, and whether the fatal wound in the calf of the leg was not produced by the fall of the deceased upon and across the blade of the scythe; whilst the only question of law was whether the killing under the circumstances amounted to the crime of murder in the second degree or manslaughter. It was contended, however, by the counsel for the prisoner that as none of the witnesses saw the scythe blade actually inflict either of the wounds, and as that in the calf of the leg was so much more severe than the other, and was alone mortal in its character, he must have in-

stantly fallen had it been inflicted before the other in the thigh, and whilst he was yet standing, and therefore if in the struggle between them, and after the cut in the thigh the deceased fell upon the scythe blade, and received the mortal wound in the calf of his leg in the fall, it was the result of accident, and the killing in that case would not amount even to manslaughter. It was so held and ruled under like circumstances in the case of *Regina v. Smith*, 34 E. C. L. Rep. 334, *Regina v. Kirhane*, 34 E. C. L. Rep. 318. And although the briar scythe was a deadly weapon, and both wounds were directly and intentionally inflicted by the prisoner, yet if the jury should believe from the evidence that he did not use it with intent to kill, or to do great bodily harm to the deceased, as they might well infer from the short jerk and the slight force with which he used it, the offense could only amount to manslaughter. *Ros. Cr. Ev.* 729, 2 *Cowp.* 830, 2 *Perk. Cr. Rep.* 637. And furthermore under all the facts proved the case could not, even in the worst aspect in which it could be viewed, rise above the grade of manslaughter.

The Court, Gilpin, C. J., charged the jury, that inas- much as our statute in relation to murder and manslaughter employs familiar terms with reference to them, of fixed legal import at common law, without any definition or qualification of their meaning, it must, of course, be understood to use them in the same sense in which they are employed and understood at common law, and the division which it makes of murder into two degrees must be understood to be made with reference to the two kinds of malice aforethought, one or the other of which was always essential to constitute the crime of murder at common law, and which was of but one degree in this State prior to the passage of the act and the recent codification of our statutes. What, therefore, was murder or manslaughter at common law, still continued murder or manslaughter under the statute in this state; the one or the other of the two descriptions of malice aforethought required to

constitute the crime of murder at common law, being respectively denominated express malice aforethought, and malice aforethought implied by law, although the crime is the same when committed with either, and is alike punishable with death at the common law. In view of this distinction the statute in terms provides that when it is committed with express malice aforethought or in perpetrating or attempting to perpetrate any crime punishable with death by our laws, it shall be murder of the first degree, and punishable with death; but without employing the other and correlative terms of the common law, to define and distinguish from it malice implied by law, it simply provides that when it is committed otherwise than has been just stated with reference to express malice, it shall be murder of the second degree. It is manifest however, that this means merely that when it is committed with malice aforethought implied by law, it shall be murder of the second degree under the statute, and punishable with whipping, pillory and imprisonment for life. The only object of the distinction being to discriminate in the penalties prescribed in the two degrees into which murder is now divided by the statute.

According to the definition of the crime of murder at common law, it is committed with express malice aforethought when the killing is done with a sedate deliberate mind and formed design, which is evidenced by external circumstances discovering or disclosing the inward intention, such as lying in wait, antecedent menaces, former grudges and concerted schemes to do the party killed some great bodily harm; and only when it is so committed can it constitute murder of the first degree under the statute. In such cases when the killing is done with a sedate deliberate mind and formed design, it is a conclusion of law that it was done with actual malice, or with express malice aforethought in the legal sense and meaning of those terms. But to make it so, it was not necessary that it should have been uttered or expressed in words, or that the design to do it should have been formed

for any length of time before the killing, if done in cool blood and with a sedate deliberate mind and formed design. And malice aforethought is implied by law from any deliberate cruel act committed by one person against another, however sudden; thus where a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. Such is the definition and illustration of malice aforethought implied by law, as recognized at common law; and even when the cruel act is committed however suddenly, without any, or without a considerable provocation, it must be a deliberate, as well as a cruel act to complete and constitute what is regarded and denominated at common law, as malice aforethought implied by law.

But in the absence of such evidence or indications of express malice aforethought, as we have before mentioned, the law will imply that it was committed with malice aforethought, when the killing is done, or the mortal wound is inflicted with a deadly weapon and without sufficient provocation and heat of blood, such as occurs in mutual combat or a fight, to reduce it to the crime of voluntary manslaughter in contemplation of law, for this is what is implied in the use of the terms, "a considerable provocation," in the definition of malice aforethought implied by law as just stated. And in such case it will be murder with implied malice aforethought, as it is termed at common law, and will only amount to the crime of murder in the second degree under our statute; but without such provocation the voluntary killing of a human being with such means cannot be reduced to the crime of manslaughter at common law, or under the statute.

• He would not refer to, or attempt to state the facts proved in the case, except so far as it might be necessary to do so in order to announce the rules or principles of the law applicable to them. The facts and circumstances of the case and all the questions which had been raised

with regard to them, or any of them, were to be carefully considered and determined by the jury upon all the evidence which had been produced before them in the trial; and if they should be satisfied from it, that David S. Casperson died of the wounds described in the evidence and received by him in the attack made upon him by the prisoner at the time and place, and in the manner stated in the evidence, and that those wounds were intentionally inflicted upon him by the prisoner, with the blade of the scythe, with which he was cutting briars when Casperson jumped over the fence and entered his premises against his order and admonition immediately before given him, and which he carried in his right hand as he hurried rapidly up to him, neither the trespass on his premises by Casperson, even under such circumstances, or any defiance which he may have given him when he did so, or any angry or insulting language which he had previously addressed to him, or any former removal of the fence by him, or any menaces or threats before made by him to kill the prisoner, could either separately or collectively, justify or excuse in law, such an attack by the prisoner upon him. And although assuming such to have been the case, and that both of the wounds were intentionally inflicted by the prisoner, there was in the opinion of the Court enough in the facts and circumstances proved and not disputed in the case, to negative and disprove the crime alleged in the indictment, that it was committed with express malice aforethought, and was consequently murder of the first degree under the statute.

As we have before remarked, however, in all cases of the unlawful and voluntary killing of one person by another without express malice aforethought, but without sufficient provocation in contemplation of law to extenuate and reduce it to the crime of manslaughter, the law itself will imply that it was done with malice aforethought, and it therefore becomes murder of the second degree under our statute. At common law there being but one degree of murder, and the crime being one and the same, and alike punishable with

death, whether committed with express or implied malice aforethought, we have no such general and established definition of the latter as of the former in the books and adjudged cases on this subject at common law; and therefore where the killing was a crime the only practical and substantial question involved at common law, was whether it was committed with either express or implied malice aforethought, or under such circumstances of provocation and alleviation as will suffice in law to negative the existence of malice aforethought, either express or implied, but not to justify or excuse it entirely, or in other words, whether it was murder or manslaughter at common law. And accordingly at common law where the killing was voluntary and unjustifiable or inexcusable, but without express malice aforethought, as before defined, and was also without such provocation or alleviation as would suffice to negative the existence of malice aforethought entirely, and thus to reduce it to the crime of manslaughter, it constituted murder committed with malice aforethought implied by law; because malice aforethought, either express or implied by law, has ever constituted the essential ingredient and characteristic of the crime of murder at common law.

But if the jury should be satisfied from the evidence in the case that the cut in the calf of the right leg of Casperson was the only mortal wound which he received in the attack made upon him by the prisoner, and that it was voluntarily and intentionally inflicted upon him by the prisoner with the blade of the scythe with which he was then cutting briars, and which he carried and held in his right hand, as he hurried rapidly up to him over a space of twenty or thirty feet, and that wound was the sole, or principal cause of Casperson's death, then we are bound to instruct you that we do not consider that the unlawful and wrongful act, the violent menaces and threats and the angry, insulting and defiant language of Casperson before referred to, and more particularly specified by us, however aggravating they may

have been to the prisoner, could under all the facts and circumstances proved in the case, and not controverted, constitute such a provocation in contemplation of law as could reduce the killing of him to the crime of manslaughter, or negative the existence of such malice aforethought as the law itself necessarily implies in such a case. For it is well settled that no mere threats, however violent, no mere words however insulting or offensive, and no mere entry or trespass on the lands and premises of another against his admonition or commands, however wrongful it may be, can justify or excuse a resort in the first instance to such force and violence and the use of such a deadly instrument as the briar scythe proved and produced before you, to repel the intrusion or trespass on his premises, or the sudden assault and attack which he made upon him with it. And in such a case the provocation not being sufficient in law to mitigate and reduce it to manslaughter, the law will imply that the killing was with malice aforethought, and which constitutes murder of the second degree under our statute.

According to the testimony of the several persons who were present on the occasion and employed in erecting the fence, as soon as the prisoner had reached the position of Casperson, and was face to face with him, and with the blade of his scythe near the ground, and partly behind the legs of Casperson, they saw the prisoner give the scythe a short jerk near the ground towards Casperson and himself, but they could not see whether the blade of it touched any part of Casperson's person or not, he then made, however, no outcry or exclamation of any kind to lead them to think that he was either cut or hurt by it, but they saw him immediately after that seize hold of the handle of it, and of the prisoner, when the latter gave it another short jerk, but considerably higher above the ground, again however, without their seeing the blade of it touch any part of Casperson's person, but they soon afterwards saw him fall to the ground, partly across the blade of the scythe, and then heard him cry out to them

not to let the prisoner kill him, and on one of them hurrying up to them and laying hold of the handle of it still in the hands of the prisoner, he said to him "take care John, I do not intend to strike him any more!" And on this evidence the learned counsel for the prisoner have contended that it is not proved that he inflicted either of the wounds, or if he did, that he did not inflict either of them intentionally, and they have furthermore contended that as Casperson exhibited no sign or symptom of having been cut or hurt on the first short jerk of the scythe when the blade of it was nearest the ground behind him, and did not fall until after the second short jerk of it was made by the prisoner considerably higher above the ground, he could not have been cut in the calf of his right leg by the first jerk of the scythe, and before he had been cut in his right thigh and groin, inasmuch as the cut in the calf of his leg, according to the testimony of the physicians, was far more severe and disabling than the cut in the thigh and groin, and was in their opinion the only necessarily fatal wound of itself which he received, and that he therefore must have received that wound, if not the other also, in his fall on the blade of the scythe; and in this view of the matter as presented by them, they have asked the Court to charge you that if neither of the wounds described were in fact inflicted by the prisoner, and intentionally by him, and particularly, if the wound in the calf of the leg was not so inflicted by him, but was accidentally received by Casperson in his fall on the blade of the scythe, then it was the result of accident, and the prisoner did not inflict it, and could not be held responsible for it, or guilty even of manslaughter. But all that matter is purely a question of fact which the jury are to consider and decide from all the evidence in the case, without any comment or instruction from the Court as to what is, or is not proved by it on either of those points, or questions of facts raised in the case. If, however, the jury should not be satisfied beyond any reasonable doubt after carefully considering and weighing all

the facts and circumstances proved in the case that Casperson's death was the result of the two wounds received by him and described, and that they were voluntarily and intentionally inflicted by the prisoner by cutting him with the scythe in the attack stated and described, or, in particular, that the cut in the calf of his right leg was the only mortal wound he then and there received, and that it was voluntarily and intentionally inflicted upon him by the prisoner by cutting him with the scythe, as before stated, it would be their duty to acquit him of any offense whatever, and to return a verdict of not guilty under the indictment; for although he stood indicted for murder of the first degree solely, it was competent for the jury by virtue of the statute to find him guilty of murder of the first, or of the second degree, or of manslaughter, or to acquit him entirely under it, according as the evidence in the case and the law applicable to it should warrant and require at their hands.

Spruance, Depty. Atty. Genl., and William H. Rogers,
for the State.

Causey, N. B. Smithers, G. B. Rodney and J. A. Bayard,
for the prisoner.

Verdict—Guilty of murder of the second degree.

THE STATE v. JOHN J. BOWEN.

The Court having left the question to the jury on all the evidence in the case, will not after trial and conviction of murder of the first degree, set aside the verdict and grant a new trial, because they did not charge them, as requested by the counsel for the prisoner, that if they believed that at the time of committing the act he was so much intoxicated as to produce a state of mind unfavorable to deliberation or premeditation, it would reduce the grade of the offense from murder of the first to murder of the second degree under the statute.

New Castle County, November Term, 1859. At a Court of Oyer and Terminer held at this term, John J. Bowen was indicted and tried for the murder of John W. Dulin, of the first degree. It appeared from the evidence on behalf of the State, that on the night of the 13th of August preceding, a brother-in-law of the prisoner had quarreled with the deceased and challenged him to fight, and while the latter was endeavoring to avoid it, and just as the prisoner joined them, said it was an old grudge of eight months' standing, when the prisoner said to the deceased if it was so, he would take it up, and at once struck him a blow with his fist, which the latter immediately returned knocking him down, and then jumped on him and asked him if he had enough, to which he replied that he had, when the deceased arose and ran off up the street, on which it had occurred in Delaware City, with a threat uttered by the prisoner as he started that he would cut his heart out, and who was soon after pursued and overtaken by him, near a store in front of which several boxes and barrels were standing, around which he dodged as the prisoner came up, but was at once seized by the hair and stabbed by him in the left breast with a pocket knife, the sharp pointed blade with which it was done being about three inches in length. The deceased again soon got away from him and started up the street, but had not proceeded far before he exclaimed that he was stabbed and cried murder, when the prisoner again said he would cut

the heart out of him; but he pursued him no further. The testimony of the physician who was called that night to see him was that the wound in the breast indicated a puncture of the lungs, and he at once deemed it a mortal wound, and that there were three or four other wounds on his body, one or two of which were not serious in their character, but the cuts in his clothes as well as the wounds themselves were evidently made with a very sharp instrument. The deceased died the following day.

From the evidence on the part of the prisoner it further appeared that he had recently returned to the place after a three years' cruise in a naval ship of the United States, and by the invitation of the deceased that he had gone with him that night to a saloon on the same street where they met with the brother-in-law of the prisoner, John Pustill, and where they remained together playing bagatelle and drinking three or four times at the bar, until about 11 o'clock, and until they were about to leave it, when the prisoner wanted Dulin, the deceased, to go home and stay all night with him, but which Pustill opposed and wanted him to go home and stay all night with him, until Dulin finally said to the latter to go away, he did not want to have anything to do with him, for he had had an old grudge against him for eight months. They were then out on the street, and Pustill invited and challenged Dulin to go down on the wharf and have a fight with him, but Dulin would not go and then the prisoner came up to them, and said to Dulin if it was an old grudge of eight months' standing he would take it up, and struck Dulin with his fist which blow Dulin returned with his fist and knocked him down. As to what followed immediately and soon afterwards between the prisoner and the deceased the testimony did not vary substantially from the evidence produced on the part of the State. On the part of the prisoner, however, it was further proved by several witnesses that he was very drunk at the time, that they had never known or considered him to be, either a quarrelsome or a violent man, or to carry about his person any

weapon or instrument more deadly or dangerous than an ordinary sized pocket knife; while in reply, on behalf of the prosecution, it was proved by an equal number of witnesses that though he had been drinking some that night, he was not drunk, but walked straight and talked rationally and sensibly both immediately before and immediately after the occurrence; and that he was both a quarrelsome and a violent man when but slightly stimulated or excited with intoxicating liquor.

Causey, Deputy Attorney General, contended that the coolness and deliberation with which the prisoner had volunteered in the first instance to espouse the quarrel of Pustill, his brother-in-law, and to force a fight on Dulin which he evidently sought to shun and avoid with either of them as long as he possibly could, and particularly the deliberation and revenge with which he afterwards pursued the deceased as he was fleeing from him, and with which he dealt the fatal and repeated stabs in his breast as soon as he overtook him, clearly constituted in law a case of killing with express malice aforethought, and consequently the crime of murder of the first degree under our statute.

George B. Rodney, (*David Paul Brown* with him,) contended that according to the evidence and the precedents in the books, it constituted a case of no uncommon occurrence, a case of mutual combat between two men who but a moment before had been on the best and most friendly terms, and that the mortal wound had not only been inflicted in a sudden and violent transport of passion produced by it, before the blood had time to cool, but it had been inflicted with an ordinary pocket knife carried daily by the prisoner about his person without any intention or expectation of making any imprudent or improper use of it on any occasion; and that too, in a state of intoxication and drunkenness on the part of the prisoner bordering on *mania a potu*, if they might judge from the symp-

toms of madness, or insane violence which seemed from the evidence to characterize his conduct on the occasion. It could therefore amount to no higher grade of homicide than manslaughter; because in a case of mutual combat, if one party kills the other in the heat of blood enkindled by it, and without taking any undue advantage of him, it is but manslaughter, notwithstanding the party killing may have commenced the combat by striking the first blow. Drunkenness, it is true, does not incapacitate a man to commit a crime, either in point of fact, or in contemplation of law. But as it beclouds the understanding and excites and inflames passion, it may evidence passion only, and not that express malice or that coolness and deliberation which is absolutely essential in all cases to constitute murder of the first degree; and therefore this case could not under the facts proved possibly amount to more than murder of the second degree. 2 *Stark. Ev.* 524, 525. *Amer. Law of Homicide* 369, 370, 371. *Mason's Case, Foster* 72.

Fisher, Attorney General, replied, that undue advantage had been taken by the prisoner of the deceased in assailing and stabbing and killing him with such a dangerous and deadly weapon as the knife with which he did it, after the deceased had voluntarily declined the combat, and had fled some distance up the street from him for the purpose of avoiding any renewal or repetition of it; and that the interval which elapsed before he started in pursuit of him with the threat that he would cut his heart out, and the distance he pursued him before he overtook him and stabbed him with that fatal knife, indicated such deliberation and determination to kill him if he could, as evidenced express malice aforethought, and made the killing under such circumstances murder of the first degree under the statute. For he had ample time in the meanwhile to draw his knife from his pocket and to open and prepare it for his purpose, and to form a deliberate design and intention in his mind to kill him with it if he could

the instant he came up with him; and in no case of mutual combat such as this was, with fists merely on both sides, and one of the parties after declining it, has been pursued and slain by the other with a deadly weapon, or with an instrument likely to produce death, had it ever been held to constitute the crime of manslaughter merely.

The Court, Gilpin, C. J., charged the jury on the facts and the questions of law presented in the case, who afterwards returned a verdict of "guilty of murder of the first degree;" and thereupon *Mr. Rodney* within the time prescribed by the rule for that purpose, submitted a motion to the Court to set aside the verdict and grant the prisoner a new trial, and filed the following reasons therefor:

1. That the Court should have instructed the jury, that if they believed the prisoner to have been intoxicated at the time the offense was committed, that such fact would reduce the grade of the offense from murder of the first degree to murder of the second degree.

2. That the Court instructed the jury if they were satisfied that a deliberate intention to kill existed in the mind of the prisoner at the time, it would warrant a verdict of murder in the first degree, without charging them that such deliberate intention to kill must be ascertained from evidence in the cause, and not as inference from the act of killing.

3. That the Court should have instructed the jury, if they found the fact of the intoxication of the prisoner at the time when the offense was committed, to be such as to produce a state of mind unfavorable to deliberation or premeditation, then in such case it would reduce the grade of the offense from murder of the first degree to murder of the second degree.

George B. Rodney. The great question in the case is that which relates to drunkenness. If the prisoner was so much intoxicated at the time he committed the offense, as to be incapable of forming a deliberate purpose to kill the deceased, then it was murder of the second degree

only, and could not have been more than that. But the Court did not so instruct the jury, though there are decisions to this effect in other States of the Union. 1 *Bish. on Crim. Law*, Sections 298, 301. For if the prisoner was so drunk as to be incapable of forming the specific intent or the deliberate design to kill, it was only murder in the second degree under our statute which has changed the common law on this subject. *Whart.* 369. *Turtle v. The State*, 9 *Humph.* 663. What we object to in this case is that the Court did not say to the jury that if they were convinced from the evidence in the case that the prisoner by reason of drunkenness was in such a state of mind as to be incapable of forming such a deliberate and specific purpose to kill the deceased, then it was murder in the second degree merely, and not murder of the first degree under the statute, although this was the main ground of our defense, and the Court was expressly asked by us to instruct the jury to that effect.

The Court, without hearing the State in reply, overruled the motion for a new trial, *Gilpin, C. J.*; remarking that the question as to the degree of the prisoner's intoxication at the time, as well as the condition of his mind and his mental capacity from that cause to form a specific intent or a deliberate design to kill or stab the deceased with the knife, was distinctly left to the jury to be decided by them on all the evidence before them on that subject, with the instruction that they must be satisfied from that evidence that he had that capacity and had formed that intention in order to convict him of murder of the first degree; and on such a question of fact, and with the conflicting and contradictory testimony before them on that point, the Court could go no further than that in this or any other case like it. The Court also substantially instructed the jury that such specific or deliberate intent must be ascertained by them from all the evidence bearing on that question in the case, but not that it could be inferred by them from the act itself.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* CHRISTOPHER R. EVANS.

To send a threatening letter to another for the purpose of extorting money from him, and menacing him with personal violence or injury in case of his refusal to comply with the demand, of such a character as would be calculated to induce a firm and prudent man to part with his money and submit to it, is an indictable offense at common law, and under the general statutory provision of this State in regard to common law offenses not expressly provided for by statute, notwithstanding the party menaced may not have yielded to the threat.

Court of General Sessions, &c., Kent County, April Term, 1860. At this term of the Court, Christopher R. Evans was indicted and tried for sending a threatening letter to Daniel Cummins to extort money from him. It bore date March 4th 1860 without the place of residence of the writer of it, but was mailed at the post office in Dover, addressed to him at Smyrna, and was received by him at the post office there on the day following, and was as follows:

DANIEL CUMMINS:

Sir, on receipt of this you will deposit, or cause to be deposited in the Bank of Smyrna, five hundred dollars, and fill up a check on said Bank for said amount made payable to R. S. Durand or order, then sign your name to it and have the cashier of said Bank to mark it "good when endorsed" and sign his name to it. You will then forward said check to Mr. C. R. Durand, Wilmington, Delaware, enclose it in an envelope directed as above. If you value your life you will obey this to the letter. Of course you will say nothing about this to any one, nor inform any person of it by letter or otherwise, neither will you show this letter to any person whatever. You will number the check properly and send it on at once. If you inform any bank officer in this or any other state that you have been compelled to make this check, or if you show this to any person or take any means of informing any person that you have received it, or take any steps to lead to the detection of the authors of this letter, you shall surely die. If you neglect to obey this, your life shall be the forfeit. You have wronged them, and must make it right, or die. You will be closely watched from this date, until the sixth of this month, and if you do not quietly do as you are bidden in this, and burn this letter, you shall not live. Finally, if, after you have done what we here bid you, it ever becomes known that you have done it, or that you have received this, remember that you shall die. Any effort on your part to evade this will certainly result in death to you. It is impossible for you to know who we are, as the gentleman named in this is only an agent for us, and received letters for us without knowing what they contain, and as he never receives any letters of his own, we have ours directed to him.

SEVEN BROTHERS.

The evidence against the accused was wholly circumstantial in its character and consisted of another letter received on the 9th of March, and dated on that day and bearing the same signature, by Mr. Cummins by

mail from Philadelphia, repeating the demand and threats, and another also of the same date received by mail from that city by the postmaster at Wilmington on that day, purporting to have been written by R. S. Durand and directing any letter coming to his office for him, should be forwarded to him at the post office at Leipsic Station on the Delaware Railroad, and which were proved by experts to have been written in a feigned hand and by the same person. That he boarded at Keith's Cross Roads in Little Creek Hundred, Kent County, but was in Dover several hours on Sunday, the 4th of March. On the 6th of the month the postmaster at Wilmington and his clerks had been notified of the occurrence and requested by Mr. Cummins to watch for and have arrested any one who might enquire at that office for a letter addressed to R. S. Durand, by one of whom he was particularly noticed and identified as the person who enquired at that office for a letter so addressed on the Thursday following, the 8th of March, when the other clerks were absent from it at dinner; and that on his arrest and hearing before the Justice of the Peace for the offense, he admitted that he had enquired at the post office in Wilmington for a letter addressed to R. S. Durand, but received none, and then went to Philadelphia where he spent the night and came home again down the railroad the next day. To rebut this it was proved by persons familiar with his hand-writing that the letters were not in his hand-writing, and that his character had always been unusually good and irreproachable.

For the State it was contended that it was an offense indictable at common law, notwithstanding the letter had failed to extort money from Mr. Cummins, if the Court and the Jury should be of opinion that it was of such a character with the atrocious threats contained in it, to intimidate and constrain a firm and discreet man to comply with the demand made in it. *Rev. Code 475, Whart. Am. Cr. Law 2. 3. 4. 5. State v. Benedict, 11 Verm. 336, U. S. v. Ravalla, 2 Dall. 297.*

On the other hand for the defendant it was contended that unless the state had proved a case of duress, or the money had been extorted by the threatening letter sent, it was not an indictable offense at common law; and as there is no statute in this case on the subject, the indictment would not lie in this case. *Rex v. Sutherton*, 6 East 126, 2 Russ. on Crimes 706. 1 Hawk. 585, stated the rule differently and referred to *Hale's P. C.* 567, but which did not support him; on the contrary, it was in accord with the authorities before cited. In the form of indictment at common law prescribed in 3 East 842, it was, among other things, averred that the money was extorted by the threatening letter sent; and such had been the doctrine recognized and ruled in the state of New York. *People v. Griffin*, 2 Barb. 430.

The Court, Gilpin, C. J., charged the jury, that the offense alleged in the indictment was the sending of a threatening letter with a view to extort money, and on the part of the defendant it was contended that this is not an offense indictable at common law, or under the laws of this state, as we have no statute expressly on the subject. But it has been decided in England that it is an offense at common law, and indictable as such, independently of the statutes in that country on the subject. This we understand to have been recognized and ruled in the case cited by the counsel for the defendant of *Rex v. Sutherton*, 6 East, 126, and that too without extorting the money demanded in it; for if it threaten personal violence or injury to the party menaced and the threat is of such a character as would be calculated to induce a firm and prudent man to part with his money and submit to the demand, it is an indictable offense at common law, and under the general statutory provision of this state in regard to common law offenses not expressly provided for by statute, notwithstanding the party threatened may not have yielded to the threat.

Verdict not Guilty.

COURT OF OYER AND TERMINER.

THE STATE *v.* JOHN R. HAMILTON.

The statute in relation to the crimes of murder and manslaughter were not intended to make any change in the general criterion and characteristic of either of them as they existed at common law, and in this state before it was enacted, except to divide murder into two separate and distinct degrees, and modify and mitigate the common law penalty in the second and subordinate degree, as established by the statute.

If the evidence is sufficient to satisfy the jury beyond a reasonable doubt that the wife of the prisoner came to her death by congestion and compression of the brain produced by blows inflicted on the side of her head by the prisoner with his fist, neither the insults or reproaches of the wife charging him with infidelity, whether true or false, and however offensive and provoking they might have been, nor the intoxication with which he in turn charged her, if such was then her condition, could justify or excuse such a violent assault and battery upon her by him, although it was committed, and all the blows inflicted were made with his clinched fist simply; because the provocation could not negative and rebut the presumption which arises in such a case that the act was committed with malice aforethought implied by law under the facts and circumstances proved in the case.

Manslaughter in contemplation of law can only occur in an assault and battery when both parties are combatants in it, or have been, and one of them in the heat of blood or a transport of passion produced by it, deals the other a fatal blow, or suddenly seizes, without deliberation or premeditation, and before he has had time to cool, a deadly weapon or instrument likely to produce death and kills him with it.

Kent County, October Term, 1860. At a Court of Oyer and Terminer held at this term, John R. Hamilton was indicted and tried for the murder of Sarah Hamil-

top, his wife, in the first degree. The principal evidence of the State was that of Owen Tomlinson who testified that on Thursday night about the middle of August preceding, he went to the prisoner's house in Smyrna, and learned from his wife that he was away in Philadelphia, and that she appeared to be uneasy about him. Was there when he returned that night, and while the prisoner was showing him some presents which he had received in Philadelphia, his wife said to him "things can be presented to you, but nothing is ever presented to me," to which he replied "you do not know what I have for you." "She then said he had been off to the city and left her all by herself for a week, and spending his money in places where he ought not to go, and asked him about a certain woman there, and if he had given her five dollars. He then cursed her and threatened to kick her out of doors and struck her a blow on the left side of her head, when she went out of the room and sat down in the kitchen, but the prisoner and himself remained for some time afterwards in the front room and took several drinks of whiskey together in the mean while, and that during the intervals he passed several times from that room to the kitchen to repeat the blow, and that he struck her in all seven or eight blows with his clinched fist on the left side of her head; that she held her left hand to the side of her head to protect it, and that he hit very hard several times with his fist, and that there was a lump swelled up on the back of that hand as large as a hen's egg. He then said damn her, she was drunk, and ordered her up stairs to bed, which order she obeyed. He thought she had been hurt but not dangerously. While cursing her, he threatened to kill her, and told her that she ought to have been dead long ago.

The wife was apparently as well as usual during the three succeeding days, but on Monday morning her condition required the attendance of a physician who testified that she complained of a pain in the left side of her head, and he saw the contusion on the back of her left hand,

and examined for, but found none on the left side of her head. She had a convulsion, however, before he left, and died on the following Wednesday morning, and a post-mortem examination made by him and two other physicians disclosed the following facts according to their evidence. The first thing they observed was a contusion on the back part of her left hand, and on the left side of her head in the region of the temple they found a good deal of congested blood between the scalp and the skull, and on opening the skull they also found a good deal of congested blood on the left side of it in the same region. They found in the larger extremity of the stomach indications of chronic inflammation, such as some times occur in cases of dyspepsia, and also some indications in the stomach of habits of intemperance. Congestion of the brain produced by excessive indulgence in intoxicating liquors would be general, but in this case it was partial and local, and the greatest or principal point of the congestion corresponded with the external bruise. And for these reasons they were of opinion that her death was caused by congestion and compression of the brain produced by external force or violence.

The Court, Gilpin, C. J., charged the jury that if they were satisfied beyond a reasonable doubt by the evidence in the case that the deceased came to her death by congestion and compression of the brain produced by blows inflicted by the prisoner with his fist on the left side of her head, it would be for them to consider and determine what crime, or description of felonious homicide he was guilty of under our statutes and the manner and form in which he was indicted. Those statutes were not intended or understood to make any change in the general criterion and characteristic of the crime of murder or the crime of manslaughter as they existed at common law, and in this state before they were enacted, except to divide the former into two separate and distinct degrees, and to modify and mitigate the common law

penalty of it in the second and subordinate degree, as established by the statute. If the jury were satisfied from the evidence that she came to her death as he had before stated, of what crime he was guilty in the eye of the law, would depend on the facts and circumstances proved in the case. Neither the insult and reproach of his wife, consisting of a gross charge of infidelity, whether true or false, and however offensive and provoking they might have been, nor the intoxication with which he charged her in turn, if such was then her condition, could justify or excuse the commission of such a violent assault and battery upon her by him, as had been proved by one unimpeached witness in the case, although it was committed and all the blows inflicted and several times renewed and repeated by him, were dealt with his clinched fist simply in the manner stated by him. Nor could such aggravation or provocation on her part have the effect in law to negative the implication of malice aforethought with which it was committed on his part, and to mitigate and reduce the killing to the crime of manslaughter under the facts and circumstances proved in the case.

Manslaughter in contemplation of law can only occur in an assault and battery when both are combatants in it, or have been, and one of them in the heat of blood or transport of passion produced by it, deals the other a fatal blow, or suddenly seizes without deliberation or premeditation, and before he has had time to cool, a deadly weapon or dangerous instrument and inflicts a mortal wound with it upon him; but not when the other, and particularly, when a woman and the wife of the assailant, is but the passive and unresisting recipient and victim of the blows from the other party; for under such circumstances the law out of its tender regard for the common infirmity of our nature, negatives, even the implication of malice and presumes that the act was committed without any malice aforethought whatever.

But to constitute the crime of murder of the first degree under our statute, and to convict the prisoner of

that offense, the greatest known to it, the jury must be further satisfied beyond a reasonable doubt from the evidence that the deceased was killed with express malice aforethought by the prisoner. And to find that it was done with this kind or degree of malice aforethought, that is to say, with express malice aforethought, according to the legal definition of it, they must also be in like manner satisfied that he did it with a sedate deliberate mind and formed design, which formed design according to the rule of law on the subject, is evidenced by external circumstances showing the inward intention, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. These are the external indications or the evidence laid down at the common law which clearly show the inward intention with which the act or acts were done, and that when they, or any of them show to the satisfaction of the jury beyond a reasonable doubt that the killing was done with a sedate deliberate mind and formed design, it would in such case be with express malice aforethought at common law, and murder of the first degree under our statute. The evidence that the killing was done with a sedate deliberate mind and formed design, should in all cases, however, be clear and entirely satisfactory to show and establish the fact that it was committed with express malice aforethought in contemplation of law.

But, if the jury were satisfied from the evidence that during the time the prisoner was drinking whisky with the witness, Owen Tomlinson, in the front room, he several times passed from it into the kitchen where his wife then was, and at several different times inflicted violent and repeated blows with his clinched fist on the left side of her head and her left hand with which she endeavored to cover and protect it; as stated by the witness, and that those blows produced a congestion and compression of the brain of which she died in a few days afterwards, it would indicate such cruelty and deliberation on his part under such circumstances as would, at least, imply malice

aforethought in contemplation of law, and would constitute the killing of her in that manner and under such circumstances, the crime of murder with implied malice aforethought, and of murder of the second degree under our statute. For this constitutes the characteristic element or ingredient of murder of the second degree under it.

The jury must, however, be satisfied from the evidence beyond a reasonable doubt, that the death of his wife was caused by the repeated blows inflicted upon her by the prisoner as before stated, for if it resulted from any other cause, and not from the repeated blows so inflicted upon her, and as stated in the evidence, he should be entirely acquitted.

Verdict of guilty of murder of the second degree.

Fisher, Attorey General.

Reed, for the prisoner.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

JAMES L. SMITH *v.* THE STATE.

On the trial of an appeal in bastardy, the father of the mother of the child is a competent witness for the State, although the mother was a minor, and was living in his family at its birth.

A bastard child begotten in another but born in this State, after the removal of the mother into it, acquires by its birth here a legal settlement in it, and in the county in which it is born.

Court of General Sessions, &c., New Castle County, November Term, 1860. This case was an appeal in bastardy. The causes of appeal filed were first, that Mary Morris, the mother of the bastard, was the minor daughter of one Noah Morris, who at the time of the begetting and birth of the child, resided in the State of Maryland; secondly, that it is not, and never was chargeable for its support and maintenance to this county; and thirdly, that the party appellant denies the paternity of it.

The evidence was that the mother was eighteen years of age and resided in the family of her father at Gunpow-

der Bridge, in the State of Maryland, where the child was begotten by the appellant, and that she removed thence with her father and his family in the spring of the present year to the town of Newport in this county, where the child was born on the 27th day of July last.

Noah Morris was called as a witness for the State, and was objected to on the other side.

Gordon, for the appellant. He is the father of Mary Morris, the mother of the child, and is interested in the result of this case, for he is to gain or lose by it, for the lying-in expenses of the mother in case the order of affiliation is sustained by this Court, are due and payable to him. Otherwise he loses that amount. He was therefore incompetent as a witness.

But the Court overruled the objection. This is a *quasi* criminal proceeding and solely cognizable in this, a Court of criminal jurisdiction, in which the State is the party complainant, and not a civil suit between the individuals concerned in it; and for which reason the father was a competent witness for the State.

The case was afterwards submitted without argument to the jury, subject to the charge of the Court, on the question presented whether under the facts proved the bastard child in question had or had not a legal settlement in this State and county.

The Court, Gilpin, C. J., charged the jury. The proof had not been contradicted that the child was born at Newport in this county, and the first provision of our statute on the subject referred to, is "the birth place of a person shall be the place of his legal settlement." *Rev. Code*, 132. And if they were satisfied from the evidence that the appellant was the father of it, they should so find and return a verdict against him.

STATE v. JAMES LIVINGSTON.

A county tax assessed against the land of a father, and so continued for several years after his death without a will, if paid by one of his sons and heirs-at-law still owning it in fee and coparcenary, within the times respectively prescribed for the assessment and payment of such a tax in the constitution, will entitle any other son and coparcener to vote, so far as the payment of a county tax is required to qualify him for it.

Court of General Sessions, &c., New Castle County, May Term, 1861. At this term James Livingston was indicted and tried for the offense of having illegally voted at the last general election in Pencader hundred in this county, without having paid a county tax preceding his said voting, assessed and collected within the time limited and prescribed therefor by the laws and the constitution of the State. The evidence on the part of the prosecution was that he voted at that election in Pencader hundred, and that he had never been assessed, and had never paid any such tax, although he was then over the age of twenty-two years.

For the defendant the evidence was that he was a son and one of the heirs-at-law of James Livingston, Sr., deceased, who died several years before that time, intestate, leaving his widow and several other children surviving him, and seized in fee simple of a tract of sixty acres of land in that hundred, which on his death descended to them in coparcenary subject to his widow's, and their mother's, right of dower in it; that she had since his death continued to reside on the land, but not as tenant in dower, or as a tenant otherwise, as no dower had ever been assigned her in any portion of it; and that since his death the land had continued to be assessed in the name of James Livingston, Sr., and was so assessed the last year, and the tax of that year upon it was paid in full by a brother of the defendant to the collector of the hundred before the last election.

The Court, Gilpin, C. J., charged the jury, that it was not necessary that a poll tax, or a tax on the head or the body of an individual should be assessed and paid to entitle him to vote at such an election, for if the defendant had paid a county tax of any kind assessed and paid within the times respectively prescribed therefor in the constitution, that is to say, having within two years next before the election, paid any such tax, which had been assessed at least six months before it, he was lawfully entitled to vote at the election in question, so far as any tax qualification was required for it. In this case all the county taxes which have been assessed since the death of the father have in effect been assessed against the land owned by the defendant and his other children and heirs-at-law, as coparceners, although during that time it has stood on the assessment lists as the land of James Livingston, Sr., and cases of a similar character have not been unfrequent in this as well as in the other counties. But being a tax on the land, it was also in effect a tax on the then legal owners of it, who since his death have been the heirs and coparceners before referred to, of whom the defendant is one, and his brother having paid the whole amount of it to the tax collector, and for which they were all equally liable, it was virtually a payment by the defendant of his proportion of it through his brother acting as his agent for that purpose.

The defendant was acquitted.

THE STATE *v.* JESSE L. FLOYD.

The records of a Justice of the Peace are not records of a Court of Record in the true import and legal signification of that term, and a forgery of such a record by a Justice of the Peace is not within the provision of the statute, which makes the forging of the record of a Court of Record an indictable offense.

Court of General Sessions, &c., New Castle County, November Term, 1861. At this term, Jesse L. Floyd,

who was a Justice of the Peace of the county, was indicted and tried for forging the record of a suit before him as such. The indictment contained two counts, alleging that he was at the time a duly constituted Justice of the Peace of the county, the first of which alleged the offense by setting out a full copy of what purported to be his docket entry in an action of assumpsit tried before him at the suit of Ferdinand Hiller against Robert Wagner for \$15.00, commenced on the 8th day of November 1860, of the issue, service and return of process on the 13th of that month, and of the appearance of the defendant, and of the entry of judgment by confession against him on that day for the amount and 56 cents costs, with this further entry immediately following that of the judgment, to wit: On the 13th day of November A. D. 1860, James Montgomery becomes surety that this judgment shall be fully satisfied. And that he feloniously forged the said record with intent to defraud the said Robert Wagner. The second count set out the same, but alleged that he forged the said record with the intent to defraud the said James Montgomery.

On the trial it appeared in evidence that the only false and fraudulent entry in it was the last, which stated that James Montgomery had become security for the payment of the judgment, and that he never signed or sanctioned it, or knew of it until about nine months afterwards.

T. F. Bayard, (*Patterson*, with him,) for the prisoner. The indictment was under the statute, *Chap. 129, Sec. 5, Rev. Code 482*, but the tribunal of a Justice of the Peace was not a Court, nor has it a record within the meaning of that provision of the statute. The indictment was also fatally defective because it failed to allege in what particular respect the record, as it was termed, was forged, counterfeited, or falsely altered, for in the main as set out, it had been proved and was admitted to be correct and genuine, the only false entry shown or alleged being the

entry of the surety to the judgment, and that as it stood, was utterly nugatory and void in law, because it did not even purport to have been signed by the surety named in it.

The Court, Gilpin, C. J., charged the jury. Any judicial tribunal in England having the power to fine and imprison, was said to be in contemplation of law a Court of Record, but there was little or no analogy between Justices of the Peace in that country and in this State. The court of a Justice of the Peace in this State had never been considered or held to be a Court of Record, in the true import and legal signification of that term, although in ordinary parlance the docket entries which Justices of the Peace were required to make and keep in suits before them, were called records, but they were always called records of Justices of the Peace, and not records of a Court of Record; and such docket entries not being within the purview of the section of the statute referred to, and under which the indictment had been framed, it could not be sustained.

THE STATE *v.* WILLIAM E. DARRAH.

All felonies in this state are expressly and specially made so in all cases by statute, and, therefore, there are none here at common law; and as the offense of bigamy is but a misdemeanor, and not a felony in this state, to allege in an indictment that it was feloniously and unlawfully committed will be fatal to it.

Court of General Sessions, &c., Kent County, April Term, 1862. At this term William E. Darrah was indicted and tried for bigamy, and the offense was proved, but it appeared that the indictment alleged that he did feloniously and unlawfully marry and take wife, &c. The objection taken to his conviction was that the offense was merely a misdemeanor and not a felony under our statute, and therefore he could not be convicted on an indictment which alleged that it had been feloniously committed by him.

For the state it was contended that it was also alleged in the indictment that he did unlawfully marry &c., and the term feloniously being entirely unnecessary and out of place in it, that allegation might, and should be, rejected as superfluous and surplusage merely. *Whart. Amer. Cr. Law, sec. 622. Commonwealth v. Squire, 2 Metc. 259.*

The Court, Gilpin, C. J., charged the jury: There was no such thing as a common law felony known or recognized under the laws of this state, for all felonies in this state were expressly and specially made so in all cases by statute, and which expressly prescribed the penalty for them respectively. And all criminal offenses in this state were divided into two general classes respectively denominated felonies and misdemeanors, and it is provided by statute that such offenses as are not made felonies by it, and are indictable at common law, but are not specially provided for in it, shall be misdemeanors, and shall be punishable as such. The objection taken to the indictment was fatal, because by the statute the offense of bigamy was a misdemeanor, and not a felony, and if convicted on this indictment, the Court could not pronounce any judgment on the defendant, because he was indicted for a felony in this case, and we have no law authorizing the Court to pronounce sentence on him for a felony in such a case. The case cited from 2 *Metc.* 259, turned on a recent statute in Massachusetts allowing a conviction of a misdemeanor on an indictment charging a felony; and so in this state we have a similar statutory provision allowing the same to be done in certain cases specifically provided for in it. In the case of *Black v. The State of Maryland, 2 Md. Rep. 376*, the Court of Errors in that state held in a case like this, that where a misdemeanor was alleged in the indictment to have been feloniously committed, and the accused was so convicted under it, no valid judgment could be entered on it.

S. M. Harrington and Wooten Atty Genl., for the State.

Eli Saulsbury, for the defendant.

THE STATE *v.* DAVID P. S. NICHOLS.

A false and fraudulent representation made by the defendant to the prosecuting witness, that he was about to loan a sum of money to a person named by him and known to the prosecuting witness to be of good credit, and if he would let him have one-half of the amount, he would repay it to him in twelve days with one-half of the profits, imported among other fallacious representations, a false and fraudulent pretension of a present and immediate purpose on his part to loan the amount of money mentioned to the person named, and he was therefore indictable for obtaining the money thereupon loaned him by the prosecuting witness under such a false and fraudulent pretense.

Court of General Sessions, &c., New Castle County, May Term, 1862. At this term, David P. S. Nichols was indicted and tried for obtaining money under false pretenses from one William McReynolds. The indictment and proof was that he falsely pretended to him that he was about to lend to one Emmor Pierson \$438, but had not that amount, and if he would loan him one-half of it, \$219, for that purpose, he should equally share with him in the profit of the loan, and he would refund the \$219 to him in twelve days thereafter, and thereby deceitfully obtained the sum of \$219 from him, and which he had never repaid to him. Pierson was a man of ample means and high credit, and but for the representation of the defendant that he was to lend the money to him, McReynolds would not have loaned it to him. On cross-examination he stated that prior to that time the defendant had frequently borrowed money of his business firm on his own check, and when he let him have the money he took his check for it at twelve days, and had sufficient confidence in him to believe his representation that he was going to lend it to Pierson was true. He knew he was prompt in the payment of all his demands, and he loaned the amount to the defendant on the credit of both of them, and expected he would repay it as soon as Pierson paid him.

The Court, Gilpin, C. J., charged the jury, That there were three distinct allegations of false pretenses contained in the indictment; first, that the defendant falsely represented and pretended to the prosecuting witness, McReynolds, that he was about to loan \$438, to Emmor Pierson; second, that if he would let him have half of the amount, he should share with him equally in the profit of the loan; third, that if he would let him have it for the purpose stated, he would refund it to him in twelve days thereafter. And although any number of false pretenses may be laid or alleged in an indictment of this kind, it is sufficient to prove any one of them, provided it is material and of such a character as will sustain the prosecution. The only false pretense, however, alleged in this indictment which is sufficient for that purpose, provided it is proved to the satisfaction of the jury, was the first, or the allegation that the defendant falsely represented and pretended to the witness that he was about to loan Pierson \$438, and obtained from him one-half of the sum, \$219, to make up the amount of the loan he falsely pretended he was about to make to him, and which properly imported that he was then and at that time going to make him the loan stated, and not that he was going to do it at some subsequent period. It was, therefore, if false and fallacious, a pretense of an existing fact, or a present and immediate purpose to loan him the money as stated, and did not fall within the case of a mere promise of future conduct, or of a trust on credit at all, as a pretense to pay for goods on delivery, but which the party did not mean to do when he bargained for them. But if the jury were satisfied from the evidence that this particular and alleged pretense was false and that Pierson was induced by it to loan him the \$219, mentioned, and the defendant obtained it from him with the deceitful intent at the time so to cheat and defraud him out of it, they should convict him, otherwise he should be acquitted.

COURT OF OYER AND TERMINER.

THE STATE *v.* THOMAS I. HORSKIN.

Express malice exists when one person kills another with a sedate deliberate mind and formed design, the formed design being evidenced by external circumstances showing the inward intention, such as lying in wait, antecedent menaces, former grudges, or concerted schemes to do the party some bodily harm; and whenever it is committed with express malice aforethought, it is murder of the first degree under the statute.

Malice aforethought is implied by law from any deliberate, cruel act however sudden; as where one person kills another suddenly, without any, or without considerable provocation, for no one, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent cause; and when it is so committed, that is to say, with malice aforethought implied by law, and not with that sedate deliberate mind and formed design which evinces express malice aforethought, it will be murder of the second degree under the statute.

A man's house is his castle; and when an attempt is made to commit arson or burglary in the dwelling-house of another, the owner or any member of his family, or even a lodger may kill the offender to prevent it; but he is not authorized to fire a gun or pistol, or to use a deadly weapon upon every invasion or breaking into his dwelling-house which may be forcibly made in the night time, for a trespass merely at any time will not warrant a resort to the last extremity in a sudden fit of anger and passion, and in such a case the provocation cannot reduce the killing to manslaughter. But when he is seeking to break in, in the night time with intent to commit a felony, the owner may as soon as that reasonably appears, resort to the last extremity in repelling it, and the killing will be justifiable.

Kent County, October Term 1862. At a Court of Oyer and Terminer held at this term, Thomas I. Horskin was indicted for the murder of John Bennett in the first de-

gree, and was tried at an adjourned session thereof on the 10th day of December 1862. The evidence was that on the night of the 22d of September preceding, a number of young men who were in the habit of resorting to the home of the prisoner in the town of Milford, finding it closed and the family had gone to bed, in wanton mischief merely, commenced and continued for some time to make loud noises outside of the door and about the street in front of it, and after throwing pebbles and small sticks against it, would run off round the corner, and soon return and repeat the same thing, the prisoner in the meanwhile cursing them aloud in his house and threatening to shoot them with his gun, and several times making his way to his front door with it and opening it, as if for that purpose. Soon after they had ceased their mischief and left, however, the deceased who was intoxicated and noisy, went to the door to get into the house when the prisoner shot him from it with his gun in the abdomen, inflicting a wound of which he died in a few hours. There was no witness to the act, but the prisoner had from the first admitted the shooting and killing of the deceased, and that he knew at the time that the person whom he shot was John Bennett, but he at the same time had always declared that he was then trying to break into his house with a piece of scantling four inches thick and from four to five feet in length, and had forced the door open with it when he shot him. But this was not seen or confirmed by any one who was in bed in the house at the time, who heard all that preceded it, as before stated, and the shooting of the gun in the house, and also the exclamations of the deceased when he was shot by it just outside of the door, though two of them were examined as witnesses in the case. The character of the prisoner as a peaceable and quiet man was proved by several witnesses called in reply.

For the prisoner it was contended that the killing under the circumstances could not amount to murder of the

first degree, as there was provocation of no slight degree, and also a want of all those indications of deliberation and design to kill the deceased or to do him any personal injury which can alone constitute the badge of express malice; nor could it amount under the circumstances even to murder of the second degree under the statute. And, if the jury should be satisfied from the evidence that the deceased was endeavoring to break into the prisoner's house when he shot him, on the authority of *Cook's case*, *Cro. Car.* 537, the offense would only be manslaughter; or if he shot him under a reasonable apprehension that the deceased was about to commit a felony, it would be manslaughter merely. But if he did it under the belief that his life, or the life of his wife, or his family or his house was in danger, and it was committed in defence of either, it was neither murder or manslaughter, but excusable homicide. *Whart. Am. Cr. Law*, sec. 1026.

The State cited *Commonwealth v. Drew et al.*, 4 Mass. 391.

The Court, Gilpin C. J., charged the jury. There was no question in this case that the prisoner killed the deceased, John Bennett, and such being the case the law presumes that it was criminally and maliciously done, until the contrary appears from the evidence in the case; and any fact in it which showed a formed design and a sedate deliberate purpose to shoot him, that shooting having resulted in his death very soon afterwards, was evidence of express malice aforethought, and of murder of the first degree under the statute. Malice aforethought is implied by law from any deliberate, cruel act committed by one person against another however sudden; as where one person kills another suddenly without any, or without a considerable provocation, for no one, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause; and when it is so committed, that is to say, with malice aforethought implied by law, and

not with that sedate deliberate mind and formed design which evinces express malice aforethought, it will be murder of the second degree under the statute.

It is true to a certain extent, that a man's house is his castle, but *Cook's case* which had been cited should be limited to the peculiar class of cases of which it constituted a leading precedent; for it is now generally admitted to have gone quite as far as it should have gone, even in such a case. When an attempt is made to commit arson or burglary in the dwelling-house of another, the owner or any member of his family, or even a lodger may kill the offender to prevent the intended mischief. But an owner is not authorized to fire a gun or pistol, or to use a deadly weapon upon every invasion of, or breaking into his dwelling-house which may be forcibly made in the night time. He should, if he has a reasonably opportunity, endeavor to remove the trespasser without having recourse to the last extremity, for a civil trespass will not excuse the firing of a gun at the trespasser in a sudden fit of anger and passion. When a person, however, is trying to break into the dwelling-house of another in the night time with the intent to commit a felony, the owner may at once kill him, for in such a case he may at once resort to the last extremity in resisting and repelling such an invasion of his dwelling, and yet in such a case it should reasonably appear that the object of such breaking, or effort to break into it, was to commit a felony; and if in such a case the offender be slain, it is excusable or justifiable homicide. A man may repel force by force in defence of his person, his habitation or his property, against one or many who manifestly intend and endeavor by violence or surprise to commit a known felony on either.

If the jury were satisfied from the evidence that the deceased made a forcible effort to break into the house of the prisoner on the night he was killed by him, they should be further satisfied that he did it with an intent to commit a felony in it, or they could not return a verdict of

not guilty on that ground. The evidence, however, was before them and it was for them alone to decide what were the facts and circumstances proved in the case. If there had been no effort on the part of the deceased to break into his house, as alleged by the prisoner, there could be no ground whatever for considering it a case of manslaughter merely; and then whether it amounted to the crime of murder of the first or second degree, would depend on the coolness and deliberation with which it was done by the prisoner in their judgment. They should give the prisoner however, the benefit of any reasonable doubt they might have in the case.

Verdict—Guilty of murder of the first degree.

McColley, Depty. Atty. Genl., &
Wootten, Atty. Genl., for the State.
Eli Saulsbury & Fisher, for the prisoner.

THE STATE *v.* ABEL RIGGS.

The Court will not set aside the verdict of the jury and grant a new trial because they were instructed in the charge that "when the fact appears that connection has been had against the consent of the woman, the law implies force," and further, "the two facts for your consideration are the fact of connection and the fact of consent or no," instead of defining and stating it, in the language of the books, as follows: "rape is the having carnal knowledge of a woman by force and against her will."

New Castle County, November Term 1862. At a Court of Oyer and Terminer held at this term, Abel Riggs had been indicted, tried and convicted of the crime of rape, and thereupon the counsel for the prisoner submitted a motion in due form for a new trial on the ground that the Court in its charge to the jury in the case had misinstructed them as follows: "When the fact appears that connection has been had against the consent of the

woman, the law implies force;" and further, "The two facts for your consideration are the fact of the deed of connection and the fact of consent or no."

T. F. Bayard for the prisoner. Such was not the phraseology in which the crime was defined in the books, for though it was perhaps, as equally terse, it meant, he thought, much more. That definition was "rape is the having carnal knowledge of a woman by force and against her will." 1 *Russ. on Crimes* 526, 556 m. 1 *Hawk.*, 169. 2 *Archb. on Crimes*, 304, 306, in notes. It must appear that the offense was committed with force and with the utmost reluctance on the part of the prosecutrix. *Whart. Am. Cr. Law* 437, note a. *Regina v. Chase*, 1 *Eng. Rep.* 544. *Regina v. Stanton*, 37 *E. C. L. R.*, 414. *Regina v. Hallett*, 38 *E. C. L. R.*, 318 *Regina v. Sanders*, 34 *E. C. L. R.*, 383. *Regina v. Williams*, 34 *E. C. L. R.*, 292. *Regina v. Clark*, 29 *E. C. L. R.*, 542.

McColley, Deputy Attorney General. It was neither usual, nor was it necessary for the Court in charging to employ the precise and technical terms employed in the books, or by the Attorney General in framing a bill of indictment. The terms noted and objected to were not the only terms employed by the Court in describing the essential requisites of the offense in the charge to the jury, and it was so clear and full as to the force required that no juror could have misunderstood the legal meaning and import of it on that point. But how would it be with the rigid and literal definition laid down on the other side in the case of an idiot, or one without sufficient mind and will to consent, or where chloroform had been administered to the prosecutrix? Could it be literally and strictly said to have been accomplished either by force, or against her will in such a case?

The Court declined to grant a new trial.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE v. JOSEPH RUSSELL.

It is not only the right, but the duty of a constable and police officer of Wilmington on his beat at a late hour of the night, if a noise or disturbance occurs under his own observation, to arrest at his own instance and without warrant, especially charged as he is with the preservation of the peace, good order and quiet of the city, any one disturbing it whenever the circumstances require it.

Court of General Sessions &c., N. C. County, November Term 1862. At this term of the Court Joseph Russell was indicted and tried for an assault and battery committed on David Wingate, a constable and police officer of the City of Wilmington, with intent to murder him. The prisoner with one Fleming and two or three other persons in a state of intoxication met on the side walk of one of the streets of the city between eleven and twelve o'clock at night, and after loud and noisy, but not angry talking, started up the side walk marching in military order and

marking time, the prisoner as file leader calling the time and repeating at regular intervals the word "left" in a voice sufficiently loud to be heard a square off, and as they proceeded by a door-step on which Wingate and Reagan, another police officer of the city were seated, the latter admonished them to keep order, or they might find themselves in the city hall prison, to which Russell replied that it would take a d—d strong man to do that, when Wingate arose and remarking to Reagan that he considered that a defiance, proceeded up to Russell and was about to arrest him, when Fleming who was next to him, interposed to prevent it, and a combat ensued between them in which Wingate was stabbed in the side with a knife by Fleming. In the mean while Reagan had joined Wingate and was contending with Russell who broke away from him and rushed to the relief of Fleming and struck several times at Wingate, but without hitting him. They were both, however, soon overpowered and arrested, and were each indicted at this term for an assault and battery on Wingate with intent to murder.

McColley, Deputy Attorney General, after the testimony had closed, waived the felonious charge against Russell.

T. F. Bayard, for the defendant, contended that he should be entirely acquitted, because it clearly appeared from the evidence that the attempt to arrest either of them was wholly without cause and wrongful from the beginning on the part of the officers, and made them trespassers *ab initio* throughout the whole transaction. The defendant was guilty of no affray, no breach of the peace, or of anything having a tendency to a breach of the peace, or of any unlawful act whatever, when he was first rudely and violently set upon and forcibly arrested by these officers, who had themselves been guilty of the first affray and breach of the peace, in their unwarrantable attempt to arrest the defendant under the circumstances.

The Court, Gilpin C. J., charged the jury. The prosecuting witness Wingate, was at the time one of the constables and police officers of the City of Wilmington, a populous community which finds it necessary to maintain a night watch or police to preserve the peace, order and quiet of the city, and it is in proof that he was on his beat and in the regular discharge of his official duty, at a late hour of the night, between eleven and twelve o'clock, when this noise and disturbance occurred under his immediate view and observation. And on such an occasion such an officer has not only the right, but it is his duty to arrest at his own instance, and without warrant, especially charged as he is with the public peace, good order and quiet of the city, any one disturbing it whenever the circumstances require it.

THE STATE *v.* JOHN A. MORRIS.

As the office of Attorney General is a constitutional office, and the mode of filling it established by the constitution is by Executive appointment for the term of five years, it is not in the power of the Legislature to enact that unless he submit an indictment for certain misdemeanors specified in an Act of Assembly to the grand jury within the first three days of the next term of the Court of General Sessions in New Castle County, that two other members of the bar named and appointed in it for the purpose, shall be thereby authorized and empowered to prepare and sign with their names, as Attorneys in that behalf for the State, proper bill or bills of indictment in such cases, and submit them to the grand jury, and if found, to proceed to try them, with all the powers usually exercised by the Attorney General in the trial of criminal cases.

Court of General Sessions, &c., New Castle County, May Term, 1863. At this term, John A. Morris was indicted under an Act of the Legislature passed at the last session, for unlawfully drawing lotteries in the State without special license and authority therefor, and by which

two members of the bar, Eli Saulsbury and Joseph P. Comegys, Esquires, were appointed, authorized and empowered to prepare bills of indictment in behalf of the State, to sign them with their names as Attorneys in that behalf for the State, and submit them to the grand jury, and to summon witnesses in the name of the State to sustain the charges contained in them before the grand jury, and if found, to proceed to try them, and that they should have for the purpose of such indictment and trial all the powers usually exercised by the Attorney General in the trial of criminal cases, against all and every person or persons who since the passage of the act of the General Assembly of this State (Volume 12, Chapter 196) had presumed or might thereafter presume to draw lotteries in the State contrary to the provisions of the first section of that act and of the Revised Statutes of the State, unless the Attorney General should submit indictment or indictments as above contemplated against the violators of that act and the Revised Statutes as aforesaid, to the grand jury of New Castle County within the first three days of the then next ensuing May Term of the Court of General Sessions in that county. *Del. Laws. Vol. 12, Chap. 321, Sec. 3.*

T. F. Bayard, for the defendant, now submitted a motion to quash the indictment; first, because the Legislature had no constitutional authority or power to appoint the gentlemen named, or any other person or persons to prepare and prosecute the indictment presented in the case; and furthermore, because they had not proceeded in the indictment and prosecution under the act in accordance with the provisions of it.

Comegys, for the State. There was a preliminary question to be presented and disposed of in the case. The defendant had been formally indicted by the grand jury for the offense alleged, but he had neither been arrested, nor had he voluntarily appeared and submitted himself to

the jurisdiction of the Court, and therefore at that stage of the case, that and no other motion adverse to it on his behalf could be entertained by the Court. It was no ordinary case, although but a misdemeanor, for it was punishable with imprisonment absolutely, and conditionally on the non-payment of the fine imposed for the commission of the offense merely. Would the Court then in a case of such grave importance entertain a motion to quash the indictment while he was out of the State, as was well known, and evaded or had failed as yet, to submit himself to its process or jurisdiction.

Saulsbury, for the State. The defendant was in contempt. And when a party was in contempt, the Court would not even admit him to appear by attorney, but would require him to appear in person and purge himself of the contempt, before they would hear any motion on his behalf, or as coming from him even by attorney. 1 *Com. Dig.* 745, 746. *Lev.* 146. 3 *Dyer* 346 b. *Rex v. Morris*, 1 *Barnardiston's Rep.* 44.

T. F. Bayard. The practice of the Courts in this State had always been otherwise, and in a very recent case, that of the *State v. Broadbent*, indicted for perjury, and who was out of the State and had never lived in it, the Court quashed the indictment on motion made by Mr. Fisher who stated that he was his counsel, before appearance, or the issue of process against him.

The Court overruled the objection, and the argument proceeded on the motion to quash the indictment.

T. F. Bayard. The Attorney General is an officer of the State by virtue of an express provision of the constitution and is recognized as such by other provisions of it, and by virtue of another provision of it he is required to be sworn or qualified to maintain the constitution of the United States, the constitution of the State, and to per-

form the duties of the office with fidelity; and those duties comprise, of course, the powers of it also. And to ascertain what those duties and powers are, we must have recourse to the laws and institutions of the country from which we have derived the great body of our law and legal institutions, and to the uniform and long-established usages, functions and practice of the office in connection with the Courts, and chief among these is the exclusive power vested in, and of course, the correlative duty exclusively devolved upon him, of instituting by indictment under his sanction and authority of all criminal prosecutions for indictable offenses and prosecuting them in the Court; and this is pre-eminently his appropriate constitutional function as a State officer. And under the constitution it can be filled by the appointment of the Governor only. And such being the case, the Legislature has no power whatever under the constitution to oust or remove the incumbent from it, or to supplant him in it even temporarily by appointing others, or by substituting another or other members of the bar to perform the duties, or exercise the power of the office in any case, or to delegate his official duty, authority and discretion to another in the prosecution of any indictable offense. But the indictment itself as drawn was essentially defective, because it contains no averment that the drawing of the alleged lottery by the defendant was contrary to the provisions of the act of cesser, *Del. Laws, Vol. 12, Chap. 196*, and of the general act in the *Rev. Code, Chap. 132*; and no averment that no indictment for the alleged offense in question had been submitted by the attorney General to the grand jury of this county within the first three days of the present term of this Court, and which was indispensably necessary to be alleged in the indictment, inasmuch as it is made by the express terms of the statute appointing them, the condition on which the power and authority of the counsel for the State in the case to submit it to the grand jury and to prosecute it in this Court, entirely depends.

Eli Saulsbury. In England the Solicitor General may prosecute in the name of the crown and on behalf of the King, as well as the Attorney General, and although in general informations *ex-officio* are filed by the latter alone, it is holden that in case of a vacancy in that office, they may be properly filed by the former, and without its being necessary to suggest on the record the cause of the variance from the usual proceeding. And it appears that in case of the illness of the Attorney General, or his interest in the subject matter, or for other sufficient reason, the King may appoint another to sue for justice in his name. 1 *Ch. Cr. Law*, 844. But the motion to quash is addressed to the discretion of the Court, and it would be error to do it in a case like this, because the Court will only quash for matter appearing in the body or the caption of the indictment, and not for matter extrinsic to it. *Amer. Crim. Law*, Sec. 520. 10 *Sm. & Mars. Rep.* 192. 4 *Black.* 101. 26 *Ala.* 58. 22 *Ala.* 17. 5 *Ark.* 453.

Comegys. We have a statute which provides that if the Attorney General neglects to attend the Courts and perform his duties, he shall be fined and the Court shall appoint another person to perform them. *Del. Laws*, Vol. 1, p. 57. And the Legislature has the power to abolish the office, for it might appoint a Solicitor General to perform all the functions and discharge all the duties of his office, or it may by law delegate all the powers of it to any one else. But the Courts usually refuse a motion to quash for a defect apparent even on the face of the indictment when the offense is grave or serious, and will leave the party to his demurrer, or motion in arrest of judgment, or writ of error. 1 *Ch. Cr. Law* 300. As to the other objections the Court would observe that there were two sets of counts in the indictment, in both of which it is alleged that the drawing of the lottery by the defendant is contrary to the acts of the General Assembly in such case made and provided, and which, of course, embraced every act which prohibited it. The

other averment insisted on as essential was not necessary, as it was wholly independent of, and had nothing to do with, the offense set forth in the indictment, but was an extrinsic fact to be proved on the trial of it merely in order to sustain it. But it is the settled practice of the Courts not to quash indictments, except for errors gross and apparent on the face of them.

James A. Bayard, for the defendant. The act involves a usurpation of power on the part of the Legislature to appoint in a mode not known to the constitution, persons to perform duties devolved by it on the Attorney General in criminal prosecutions. He is the public prosecutor of the administration of criminal justice in the State, and if not the only, is the highest, law-officer in it. And the office is as clearly established by the constitution for the prosecution of criminal cases when by indictment, as the Judges are who constitute the Courts which hear and decide them, and their respective offices are filled in like manner by the appointment and commission of the Governor solely, the Judges during good behavior, and the Attorney General for the term of five years, if he shall behave himself well so long in said office, and if he does not, the constitution further provides for his removal from it; and neither his duties or his powers for this purpose can be transferred by the Legislature to another in any case whatever, nor can the office be abolished without amendment and alteration of the constitution in the several distinct provisions in which it is expressly recognized as a State office existing under it. In every indictment founded on a statute, all that is essential to constitute the offense under the statute must appear in the indictment by the necessary averments, and if any such averment is wanting in it, it is a good ground for a motion to quash it. The gentlemen who appear as public prosecutors in the place of the Attorney General in this case, are but temporary agents of the Legislature acting under a special authority, and if it were valid, would they not be

bound to show affirmatively that they were proceeding in all material respects, in strict conformity with it? Now, all the powers purporting to be conferred upon them are purely conditional by the express terms of the act, the first of which is the power to prepare in their own names in behalf of the State, a bill of indictment and to submit it to the grand jury of this county in every such case as they allege this to be, while that condition on which it entirely depended was, unless such indictment or indictments should be submitted by the Attorney General to the same grand jury within the first three days of the then next ensuing term of the Court of General Sessions in this county, and which is the present term of this Court. The indictment before us shows that it was prepared by them, signed with their names, instead of with the name of the Attorney General, and was submitted by them to the grand jury, and that it has been found and returned to this Court by that body, but not a word is alleged in it in regard to the express condition on which their power to draw, sign and submit it to the grand jury, absolutely depended. And under the special authority thus conditionally conferred upon them, was it not on the plainest principle of logic, as well as pleading, just as necessary that the occurrence of that condition precedent should be alleged in the indictment, as that it should be alleged or appear on the face of it, that they prepared, signed and submitted it to the grand jury? On the other point our position is this. Under the act of the last session, no one, neither this defendant, nor any one else, can be indicted for drawing a lottery, unless it affirmatively and satisfactorily appears that he drew the same under a pretended right claimed by him under the lottery act and grant of the Legislature in 1859 and which had been declared forfeited by the act of the Legislature in 1862, contrary to the provisions of the act last referred to, and the provisions of the general statute on the subject contained in the Revised Code. Because the power conferred on these agents to indict and

prosecute is not only a special and specific power, but the offense to which it applies is special and specific, while the jurisdiction of the Court under the act of 1862 is also special and specific, for by the terms of these acts it is expressly restricted and confined to the offense of drawing a lottery only when it is committed by any one under a pretended right claimed under the act of 1859, and which, as he had before remarked, the Legislature had declared forfeited by the act of 1862. And yet, nowhere is it alleged in the indictment that the drawing of the lottery for which the defendant is indicted, was made by him under such a pretended right or claim; not is the particular character of the offense, or the special and specific offense for which alone he could have been indicted under this special act, any where alleged or defined in the indictment.

The office of Attorney General in this State was derived with the body of our law, criminal as well as civil, from the mother country, where he is a great officer under the King and appointed by him to prosecute for the crown in matters criminal especially, and is clothed with a high official discretion, and is the sole judge as to the necessity and propriety on the law and the facts involved in such cases of instituting indictments in them; and here he is a high constitutional officer of the State appointed by the Executive to prosecute for and in the name of the State by indictment in criminal cases here, and is clothed with a like official discretion and judgment in regard to the necessity and propriety of instituting such prosecutions. And it had been judicially decided in the State of New York that when the Legislature assumes the power to take from a constitutional officer the substance of the office itself, and to transfer it to another who is to be appointed in a different manner and is to hold it by a different tenure than that provided for by the constitution, it is not a legitimate exercise of the right of the Legislature to regulate the duties or emoluments of the office, but an infringement upon the constitutional mode of appointment. *Warner v. The People*, 2 Denio 281.

The Court, a majority of whom held that as the office of Attorney General in this State is provided for and recognized in several clauses of the constitution, it is a constitutional office of the State, and as the mode of filling it established by the constitution is by executive appointment without the approval or concurrence of either branch of the Legislature, and tenure of it is for a term of five years, it was not within the constitutional power and authority of the Legislature to enact the provisions of the statute specially referred and objected to in this case, and that of itself constituted a good and sufficient ground for quashing the indictment; and ordered it to be quashed, *Gilpin*, Chief Justice, dissenting.

COURT OF OYER AND TERMINER.

THE STATE *v.* LEWIS LIST.

If a constable or a police officer is publicly assaulted and fired at with a pistol by one who had a previous grudge against him, and returns the fire and the latter then turns and flees and is pursued by the officer to his own dwelling-house, but before he can get the door entirely closed against him, and whilst he is struggling with all his strength to do so, the officer violently forces it open and rushes in with his pistol cocked in his hand, and is instantly shot and killed in the house by the latter, the killing will not be justifiable homicide or murder of the first or second degree, but as it was intentional it will be voluntary manslaughter; for if the officer's purpose was simply to arrest him for the offense just before committed in firing at him, the anger, passion and violence with which he forced his entrance into the house with a cocked pistol in his hand, and without first demanding to be admitted, exceeded the limits of his official authority to make it, and rendered the attempt to do so in the manner pursued by him unlawful.

New Castle County, November Term, 1863. At a Court of Oyer and Terminer held at this term, Lewis List was indicted and tried for the murder of John R. Baylis, a constable and police officer of the City of Wilmington, in that city on the 9th day of September preceding: and as usual the indictment was for murder of the first degree.

The prisoner had been drinking to excess for a day or two before that, and had been to some extent noisy and troublesome on the street in that condition, and had been

roughly rebuked and handled for it the night before by the deceased in his capacity as a peace officer and a member of the city police, and early the next morning complaining of this treatment to a neighbor on his casually stepping into his house for a few moments, the prisoner borrowed a loaded six-barrel pistol from him, and stepping out with it in his hand on the street proceeded up it towards the next corner above, where Baylis was then standing leaning against a lamp post with a drawn pistol of a similar description also in his hand. The prisoner was brandishing his in his hand in a violent and excited manner, and threatening to kill any one who attempted to interfere with him as he thus proceeded up the street. They had each in the mean while cocked their pistols, and on the prisoner's reaching the distance of half the square from the corner where Baylis was still standing leaning against the lamp post, the latter called out to him in a defiant tone to "fire away!" when the prisoner instantly fired one shot from his pistol at him, but without any effect, and which the deceased immediately returned with one discharge from his at him, but likewise without any effect. The prisoner then fired a second time at the deceased, and the deceased immediately afterwards a second time at him, and with the like results in both instances. The prisoner then turned about and ran down the street past the front of his dwelling-house and up an alley into the kitchen of it, rapidly pursued by the deceased in a very angry and excited mood, swearing he would kill him, up to the door of it, which the prisoner had endeavored to close against him immediately on entering it, but without being able to get it quite closed and fastened before the deceased had reached it, when a brief struggle immediately ensued between them, the one by main strength on the inside to hold it as nearly closed as then could be, and the other on the outside to force it open and effect an entrance into the kitchen. No demand however was made of the prisoner by the deceased for his surrender, or for his admission as an officer for the

purpose of arresting him for the offense which he had just committed, on the contrary, he was excited, angry and violent, and with his pistol in his hand soon forced his way by superior strength into the kitchen, hurling the prisoner back from the door half across the room as it was then irresistibly forced open by him. Several pistol shots then immediately followed in the kitchen when Baylis fell to the floor and soon expired. One of them afterwards extracted from the wood-work of it was too large for the calibre of the prisoner's pistol, but was of the proper size for that of the deceased. The testimony showed that his death was caused by three small bullet wounds, one in the neck and two in the head, and that both of the last were mortal.

Gray, Deputy Attorney General. The indictment was for the crime of murder of the first degree in killing a public officer in the performance of his official duty, and in unlawfully resisting his attempt to arrest the prisoner for an assault and battery committed on him with the intent to murder him by the prisoner, which was a felony, and which the evidence clearly showed was not only committed with premeditation and malice, but that the killing of him which soon after followed was prompted by the same feeling of revenge and animosity, and was therefore committed with express malice aforethought. The firing of the pistol at the deceased by the prisoner and his flight and attempt to escape from arrest for it, and the pursuit and attempt by the deceased to arrest him for it, as he not only had a right, but was legally and officially bound to do, if practicable, had been particularly detailed in the evidence, and showed that the escape of the prisoner to his own house and his ineffectual effort to close the outer door of the kitchen and prevent the entrance of the swift pursuing officer, instead of qualifying or mitigating the offense of killing him, only aggravated it, as it converted his flight from arrest into a most violent, fatal and murderous resistance to it. 1 *Russ. on Crimes*, 447, 449.

Gordon for the prisoner. The jury should be satisfied from the evidence in the case just as they should be in regard to any other material fact essential to be proved in it, that when the prisoner fired his pistol twice on the street at the deceased on the commencement of the affray and duel between them at the instigation of the latter, that it was his intention then to kill him in order to constitute it a felony; but even, if they should be satisfied that such was the fact and it was a felony, and they should be further satisfied that after having fired the two shots without any effect, he endeavored to decline any further contest with the deceased, and for that purpose, or to avoid arrest, turned and fled down the street pursued by the deceased to the sanctuary of his own dwelling-house, with an oath and a threat that he would kill him, and that after the prisoner had reached it and taken refuge in it, the deceased with great anger and violence proceeded as soon as he had reached it to break or force open the outer door of it, and to make his way into it with his pistol cocked in his hand, and with the intention to carry that threat into execution, then it was a case of killing in self-defence on the part of the prisoner, and it was under those circumstances justifiable in law. Or if the jury could possibly believe on the evidence before them that his intention merely was to arrest him when he forced open the door and effected his entrance with so much passion and violence into the house, but at the same time should be satisfied under the instruction which he would now ask the Court to give them on that point, and that was, that on the facts proved the deceased had clearly exceeded the limits of his lawful authority as a constable and a police officer in the violent manner in which he forced open the door and broke into the house, even if his purpose and intention solely was to arrest the prisoner, then and in that case the killing was excusable on the part of the prisoner; and therefore in either case he should be acquitted. 3 *Greenl. Ev. Sec.* 116. *State v. Mahon*, 3 *Harr.* 568.

Wootten, Attorney General, replied.

The Court, Houston, J., charged the jury. The fact of the killing of John R. Baylis by the prisoner, Lewis List, in the City of Wilmington on the ninth day of September last, and that Baylis was at the time a constable and police officer of the city are proved and not denied. At common law the crime of murder consists of the killing of any person under the peace of the State, with malice prepense or aforethought, either express or implied by law; and in either case it consists at common law of but one degree. By a comparatively recent statute of our State, however, the crime has been divided into two degrees, as they are termed, that is to say, into the crime of murder of the first degree, and the crime of murder of the second degree; and in describing and defining them it provides that every person who shall commit the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree and of felony, and shall suffer death; and every person who shall commit the crime of murder otherwise than is set forth in the preceding provision, shall be deemed guilty of murder of the second degree and of felony, and shall be fined at the discretion of the Court, shall stand one hour in the pillory, shall be whipped with sixty lashes, and shall be imprisoned for life, if a white person, but if a negro or mulatto, shall be sold a servant to the highest bidder, for life. Express malice aforethought is therefore the general characteristic of the crime of murder of the first degree under the statute, and except where murder is committed in perpetrating or attempting to perpetrate, any crime punishable with death, it is the essential and indispensable ingredient of it. For a definition of the crime of murder with express malice aforethought the statute silently remits us to the common law where it has been long ruled and recognized to be when one person kills another with a sedate deliberate mind and formed design, such formed design being evidenced by external circumstances showing the inward

intention, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And where this sedate deliberate mind and formed design to do the bodily harm is wanting, or the external evidences in the case fail to show such a sedate deliberate mind and formed design to the satisfaction of the jury, the killing cannot be deemed to have been committed with express malice aforethought, or to constitute the crime of murder of the first degree under the statute.

And the language of the statute which provides that every person who shall commit the crime of murder otherwise than with express malice aforethought, or as is set forth in the first provision of it, also remits us to the common law for the meaning and intention of it, and the import of which is that every person who shall commit the crime of murder otherwise, that is to say, not with express malice aforethought, but with malice aforethought implied by law, shall be deemed guilty of murder of the second degree under it, and shall be punished accordingly. But notwithstanding this kind or degree of malice aforethought under the statute is not express, but implied by law, it is susceptible of direct and positive and circumstantial proof as well as express malice, for the law never implies it without sufficient evidence apparent to the satisfaction of the jury in the case to warrant the inference of it. Malice aforethought is implied by law from any deliberate, cruel act committed by one person against another, however sudden, as if one person kills another suddenly without any, or without an adequate provocation in contemplation of law to reduce the killing to the crime of manslaughter, the law will imply that it was committed with malice aforethought; and wherever the act without such provocation is committed with deliberation, cruelty, or indifference to its consequences, but not with express malice, or in a way, or with means likely to produce death, the law will imply malice aforethought from the act itself, notwithstanding no particular enmity,

resentment, or hatred against the person killed can be shown on the part of the person killing; and in all such cases the killing will constitute the crime of murder of the second degree under our statute.

Manslaughter may be defined to be the offense of killing a human being without malice, either express or implied, but under such circumstances as cannot render it wholly innocent, or excusable or justifiable in law. When the killing is done in a sudden transport of passion and heat of blood on a sufficient provocation in contemplation of law, it is imputed by the benignity of it to the weakness and infirmity incident to our nature, which negatives, even the implication of malice, and which is essential, at least, to constitute murder of the second degree under the statute, but which is nevertheless criminal and felonious, for it also constitutes a high crime under our laws, and is punishable with fine and imprisonment and the infamy which follows as a legal consequence in all cases of felony. And of this crime there are two classes, voluntary and involuntary manslaughter. The first is where the killing is intentional, but is done in a sudden heat of blood under such a provocation as the law considers sufficient to repel the presumption or implication of malice aforethought, and to negative the existence of that calmness and deliberation which is essential to constitute it, as in cases of mutual combat where the parties have become involved in the fight without any preconcert between them for the purpose, or any premeditation and preparation for it on the part of the slayer, and it was done in the heat of passion produced by it, suddenly, without previous premeditation or preparation, and before there is time for the blood to cool, or that sudden transport of passion to subside; and the more dangerous and deadly the instrument or weapon used and with which the killing is intentionally done in such cases, the more rigid and exacting is the rule of law on this subject, in order to reduce it from the crime of murder of the first or second degree

under our statute, to that of voluntary manslaughter, as it is known and defined in the law. It is not necessary however on this occasion to advert to the other well-known, but comparatively limited classes of cases in which it has been held, and is now well settled, that the provocation may be sufficient to mitigate and reduce a voluntary act of homicide from the crime of murder to that of manslaughter at common law; nor is it necessary now to say more in regard to the other class of cases referred to, and denominated cases of involuntary manslaughter, than to remark generally that the prominent cases of this kind occur where the killing is not done intentionally, but is the result merely of gross and culpable negligence on the part of the accused in the relation held by him at the time to the deceased.

But it has been contended in this case on behalf of the prisoner that he is entitled to an entire and absolute acquittal on the evidence before you, because he shot and killed the deceased in self-defense in an unlawful and violent assault made upon him with a loaded pistol in his own house, after he had abandoned and retreated from the preceding contest between them on the street, and had taken refuge from him in it; and the counsel for the prisoner has asked the Court to so instruct you. The evidence is before the jury, and there is no occasion for our repeating it. We will say, however, with reference to this defense that excusable homicide *se defendendo*, or in self-defense occurs in law when a person is assaulted upon a sudden affray, and in defense of his person where certain and immediate suffering of some serious and dangerous injury in his person would be the consequence of waiting for the assistance or protection of the law, and there was no other probable means of escape from it he kills the assailant. And in such case it is excusable or justifiable homicide. But to reduce homicide even in self-defense to this character and innocent complexion, it must be shown that the party killing was closely pressed by the party killed and had retreated as far as he conven-

iently or safely could in good faith with the honest intent to avoid the violence of the assault; and the jury in such case must be satisfied that unless he had killed the assailant, he was in imminent danger of losing his own life, or of suffering some great bodily harm. It closely borders on the crime of voluntary manslaughter as before defined, for in each it is alike presupposed that violent anger and passion has been excited on both sides, and that blows, or what is equivalent to them, have passed between the parties, but with this distinguishing difference between them, that in manslaughter it must appear, either that the parties were actually engaged in mutual combat when the mortal stroke or wound was given, or that there was not time for the passion afterwards to subside before giving it, or that the slayer was not in imminent danger of being killed by his assailant, or of otherwise being grievously injured by him in his person; while in homicide, excusable or justifiable on the ground of self-defense, it must appear either that the slayer did not begin the fight, or that having begun it, he endeavored to decline and avoid any further conflict, and being afterwards closely pressed by his antagonist, he killed him in defense of his own life. It is also a well settled principle of criminal law on this subject that if a person engaged in a sudden affray quit the combat before he has inflicted a mortal wound on his antagonist, and retreat and fly as far as he can with safety, and then impelled by sheer necessity kills his adversary in defense of his own life, it is excusable homicide. It differs from manslaughter in the particular before adverted to, that in manslaughter the mutual combat is assumed to continue until the mortal stroke or wound is given, or that the heat and passion engendered by it so continues on the part of the person giving it; but in excusable homicide of this character the slayer must have declined the combat and retreated as far as he safely could before the mortal stroke was given and then only in defense of his own life, or to save himself from some great bodily injury. And just here we

would say that on this point it is also a well settled principle of law that every man's house is his castle, and is considered his best and safest place of refuge in such case, and that no one is required to retreat or flee from personal danger further than the security of his own dwelling in such cases. And in such a case of excusable homicide in self-defense, it is not material which of the parties began the sudden affray, or gave the first blow, or fired the first shot, or whether the slayer had inflicted wounds not mortal before he declined the combat and retreated or fled from it, and from his adversary, because if he declines the combat before a mortal wound is given by him, and retreats as far as he can with safety, or the law requires of him in such a case, he will be justified in giving a mortal wound afterwards in defense of his own life. But at the same time we must further observe to you in regard to the law on this subject, that when in such a case the sudden affray is begun by the slayer, and was prompted by antecedent malice and animosity on his part against the other party which may be inferred from facts and circumstances, and the retreat from the affray is but specious and colorable, and he then turns on his pursuing adversary and kills him, it will be murder, at least, of the second degree under the statute.

But these general principles of the law which we have just stated are subject to certain well-known qualifications in the case of a public officer when he is acting in the due execution of his office and is clothed with the sanction and the powers of it, and his death is the result of unlawful resistance to his authority in his efforts to arrest the slayer. All ministers and officers of justice, such as sheriffs, constables, bailiffs, watchmen and policemen while in the execution of their office are under the peculiar protection of the law, for without it the public peace and tranquility could not be maintained, nor would either life or property be secure against the lawless; and for these reasons the killing of public officers in the performance of the duties of their office, has been deemed

murder with malice aforethought, as being an outrage willfully committed in defiance of the justice and authority of the State. But this protection of the law extends only to public officers, who have authority to arrest and imprison, (and their assistants,) and who use that authority in a proper and lawful manner, for it is well settled that any material or substantial defect in the authority of the officer, or in the legality of the process with which he is armed, or in the regularity of the proceeding on his part, will, in general, have the effect to extenuate the crime of killing him and reduce it from the grade of murder to that of manslaughter in such a case. The authorities and decisions on this point warrant us in stating generally that when such an officer in executing his office, as in making an arrest, or attempting to make an arrest on the commission of a felony, or a breach of the peace, proceeds irregularly and transcends his authority, and becomes a wrong doer and a trespasser himself in the eye of the law, it affords him no protection or impunity in such excess; and if in so doing he be killed, the offense will amount to no more than manslaughter in the person whose rights and liberties have been so violated and invaded by him. If such an officer, however, proceeds irregularly or illegally and exceeds his official authority in his efforts to apprehend a person at the time legally liable to arrest, and is opposed and resisted with force and violence and killed by him, that fact cannot of itself constitute a case of excusable homicide in self-defense, or reduce it below the crime of manslaughter, at least.

As to the manner in which such an officer should proceed to make an arrest, it is not easy to prescribe any precise and definite rule under the varying circumstances and degrees of force and resistance which he may be destined to encounter in the legitimate discharge of his hazardous and responsible duty. But there is one rule well settled on the subject, and it is this, when a criminal offense of the grade of felony has been committed in the

view of the officer, he may at once proceed at his own instance and by virtue of his official authority without any process or warrant, to arrest the offender, and if resisted in the effort to apprehend him, he may use and employ whatever force and means that may be necessary under the circumstances to overcome that resistance and to effect his arrest. But even when the criminal offense committed in the view of the officer is of the grade of felony, and the offender does not resist the officer, but merely flies or runs away from him to avoid arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For in civil cases, and also in the case of a breach of the peace, or any other misdemeanor or criminal offense less than felony, if the officer should pursue the offender in his flight to escape from arrest, and kill him in the pursuit, it will at least be manslaughter in contemplation of law under any circumstances, and may amount to murder when they are of a wanton, cruel and aggravated character. But if a felony be committed, and the felon fly from justice, the law holds it to be the duty of every man, and still more so, of every police officer, to use his best endeavors to prevent his escape, and to secure his arrest; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, it will be deemed in law justifiable homicide. And the importance of this distinction which we have just noticed, and the application of it to this case, will be seen when the jury comes to consider the evidence before them in relation to the beginning of the difficulty between the prisoner and the deceased on the morning of the 9th of September last, and which resulted in the death of the latter in a short time afterwards. For if the jury believe from the evidence that the prisoner began the affray between them by firing a pistol at Baylis with intent to kill him, and that he was at the time near enough to him to have killed him, had he hit him, it constituted an assault and battery with intent to murder him, which is made a felony by express provision of our statute; but should the jury not be satisfied from the evidence that he fired a

pistol at him with the intent to kill him, it would not have been a felony, but a misdemeanor merely, the intent to kill, as well as the firing of the pistol at him, being indispensably necessary to constitute the act of felony.

But without commenting on what immediately preceded or immediately followed the firing of the first pistol-shot by the prisoner, on the part of either of them according to the evidence, we must say to you that if the prisoner afterward turned and fled from the street to his house pursued by the deceased, and shut the outer door against him, and endeavored to hold it closed against him to prevent his entering it, and the latter proceeded at once with force and violence and in an angry and threatening manner with a pistol in his hand and with threats on his lips to kill the prisoner, to force the door open, and so effected his entrance into the house, the proceeding, to say the least, was grossly irregular on his part as a public officer, and exceeded the proper limits of his official authority in making an arrest, even under such circumstances; and if in the violent rencontre which immediately ensued between them with pistols in the hands of each of them in the house, the prisoner shot and killed Baylis, the killing would amount to the offense of manslaughter only. For if the jury should be satisfied from the evidence that the assault and battery committed by the prisoner on the deceased before he fled from the street to his house by shooting at him with his pistol, and that it was done with the intent to kill him, and that it therefore amounted to a felony, the deceased as a constable or a police officer, would not have had authority in law to proceed with force or violence to break open the door for the purpose even of making a peaceable arrest simply, without previously and formally notifying the prisoner of his business and purpose to arrest him peaceably, and a demand to enter for that purpose, and the refusal of that demand by the prisoner; and, of course, equally irregular and unwarrantable, if not more so, would such a proceeding have been on the part of the deceased, if the offense for which the

prisoner was to be arrested in such a manner, had been but a misdemeanor instead of a felony.

If such then were the facts of the case according to the evidence before the jury, the Court were bound to say to them, that the prisoner having fled to the sanctuary of his own dwelling, and shut himself up in it, as best he could, Baylis, the deceased, had transcended his authority as a public officer in his violent attempt at once to force his way into it, even if his purpose was merely to arrest him. Had he gone to List's door, notified him of his business and purpose, and demanded his surrender, and he had refused to give himself up to him as his prisoner, he would then have been warranted and justified in forcing an entrance into it through the door by breaking it open, if necessary, and yet even in that case he should have proceeded to make the arrest as peaceably and gravely as possible, and without angry menaces or threats of vengeance or violence. It could not, however, justify or wholly excuse the killing of him by the prisoner under the circumstances, or mitigate or reduce the offense in law below the crime of manslaughter.

Verdict—Not guilty.

THE STATE *v.* ROSANNAH R. GARDNER.

When one of two persons engaged in a mutual combat, suddenly seizes from a number of knives lying on a table near at hand, and exhibits sufficient thought, reflection and discrimination to select one more dangerous and deadly than the rest, and stabs the other with it, and death ensues, it will be evidence of express malice aforethought, and murder of the first degree under the statute; and this conclusion of law is only the stronger when the party thus killing the other with such deliberation and formed design to kill her, or do her some great bodily harm, has had time after the combat has ceased between them, for her blood to cool and for reason and reflection to regain control over her passion.

New Castle County, May Term, 1864. At a Court of Oyer and Terminer held at this term Rosannah R. Gard-

ner, negro, was indicted and tried for the murder of Martha Ann Segreave, negro, of the first degree. The proof was that the parties were friends and staying at the time at the house of a friend of theirs in the city of Wilmington, and that they had been out together in the early part of the evening, and on their return and re-entering it the deceased was weeping and said to the mistress of it that she had something to tell her, when the prisoner exclaimed that she was a liar, and should not tell her, to which the deceased replied that she would tell her, or slap her in the mouth. The prisoner then stepped up before the deceased and defied her to slap her in the mouth, which she did, whereupon a scuffle and fight ensued between them, but they were soon separated and turned out into the yard of the premises, where no further collision occurred between them. Both had been drinking, and were somewhat intoxicated. They then re-entered the house and after some further angry words between them, the deceased laid down on a bed in the room, and the quarrel seem to have entirely ceased between them, but after a few moments the prisoner rose from her seat and went round the bed and struck the deceased lying upon it two or three blows with her fist, who immediately sprang up from it prepared again for battle, but the prisoner at once receded from the position across the room to a table and seized a sharp pointed one from a case of table-knives lying upon it, and with it drawn in her right hand started again towards the deceased, when another woman who interposed and placed herself between them to keep them apart, seized and snatched the knife from her hand and threw it back on the table, when the prisoner seized the knife again from the table and advancing towards the deceased, said to the woman who still stood between them, that if she did not get out of her way she would cut her, or any other nigger wench who stood in her way, and who at once moved aside, when she stepped up to the deceased with the knife drawn back in her right hand and stabbed her with it in the upper and anterior portion of her

right thigh. This occurred about 9 o'clock in the evening, and although a physician was immediately sent for and who arrived before 10 o'clock, the flow of blood from the wound which had been very great, had then ceased and the deceased was so far exhausted by the loss of it, that she was then past recovery, in his judgment, and expired about 7 o'clock the next morning. The knife had penetrated the thigh to the depth of two inches, and had cut the femoral artery. The prisoner, as soon as she discovered what she had done, threw herself on the bed and exclaimed that she had stabbed Martha, that she would die, and she would be hung for it, but soon after rose from the bed, manifested much concern about her and her condition, called for salt to staunch the flow of blood, and for some time supported her head upon her arm as she lay bleeding on the floor.

The Court, Gilpin, C. J., charged the jury. After defining the crime of murder of the first and second degrees, under the statute, and also the crime of manslaughter, and reading the definition of express malice aforethought as stated in 1 *Russ. on Crimes*, 482, that the instances therein mentioned were only illustrations of the meaning intended to be conveyed by the definition, but that there were other illustrations or instances of express malice aforethought in cases of murder at common law and under our statute which were equally true and apposite, although not specifically mentioned or referred to in that definition. As for instance where two persons become involved in mutual combat and one of them in the midst of it turns to seize a weapon or a dangerous instrument from a number near at hand, and in so doing he exhibits sufficient thought, reflection and discrimination to choose and select from them one in particular more dangerous, and deadly than the rest, and shoots, strikes or stabs the other with it, although done quickly and on the spur of the moment, it may show such deliberation and formed design to kill, or do the other some great bodily harm

with it and death results from it, as will constitute in contemplation of law murder with express malice aforethought, and the crime of murder of the first degree under our statute. And, of course, this conclusion of law is only the stronger when the party thus killing the other with such deliberation and formed design to kill her, or do her some great bodily harm, has had time after the combat between them had ceased, for her blood to cool and for reason and reflection to regain control over her passion. Because every one must be presumed to intend the natural consequences of his own act when committed with such a degree of deliberation and design, as is thus evinced by the party inflicting the fatal wound. Nor can it alter or mitigate the grade or degree of the murder that the party was at the time in part excited or inflamed with intoxicating liquor, as well as anger and passion, or was intoxicated, if she had sufficient knowledge, thought and reflection left to be able to exercise and to show such deliberation and choice and to form such a design.

The Chief Justice then briefly recapitulated the facts proved in the case and added that if upon the evidence the jury should entertain a reasonable doubt on that point, as to the deliberation and design formed by the prisoner under all the facts and circumstances proved, to stab the deceased with the knife as proved in the case, she would be entitled to the benefit of it, and in such case she should not be convicted of murder of the first degree, but whether of murder of the second degree or of manslaughter it would be for the jury to determine from all the facts and circumstances proved in the case, but if they should not be satisfied beyond a reasonable doubt that there was not sufficient time after the personal collision and conflict between the parties had ceased, for her blood to cool and her passion and fury to subside, so as to enable her to resist the impulse of it, and to restrain herself from seizing the knife in question and stabbing the deceased with it, as detailed in the evidence and not contradicted, the killing

could not be mitigated and reduced to the crime of manslaughter in contemplation of law.

Verdict—Guilty of murder of the second degree.

McCaulley, Deputy Attorney General, for the State.

Alderdice, for the prisoner.

THE STATE v. JOHN BRISTER.

Unless a confession taken before a Justice of the Peace and reduced to writing by him at the time, is read by him to the accused and is approved and signed by him, it will not exclude parol evidence of it. But parol or verbal confessions in cases of felony should always be received with scrutiny and caution, and although admissable in evidence, the jury may discredit them, if all the proof in the case shall appear to warrant them in doing so.

On an indictment and trial for arson the Court instructed the jury to acquit the prisoner, because it was not alleged in it that it was committed feloniously.

New Castle County, May Term 1864. At a Court of Oyer and Terminer held at this term, John Brister, a negro boy about fifteen years old, was indicted and tried for the crime of arson in setting on fire the dwelling house of James Davis, in St. George's hundred. He had been sent by his master, James Williams, to whom he was indentured as a servant, to Mr. Davis to work for him on his farm, who had whipped him for not working as he should, for which he ran away a few days afterwards and on the Saturday night following about 10 o'clock he went over to his mother's house to look for him, without finding him, but on his return about one hour afterwards, found his house on fire and nearly burnt down, and the prisoner there sitting on a log looking at it which had then just fallen in, and also a good many of his neighbors there who had collected at the fire. He further testified that

the prisoner staid there all that night, and did not try to leave, so far as he knew, but he told him not to go away, for he suspected him of having set it on fire, which, however, he denied, as well as to others present who also charged him with it; and that by his orders he went into the smoke house and staid in it all that night. The next morning he had him formally arrested for it and taken before a Justice of the Peace at Middletown.

Thomas R. Hayes testified that the prisoner worked for him the Friday and Saturday before the house was burnt down on the night of the latter day. He had driven from home that day and returning in the evening, he told him to take his horse and carriage and turn him out, but that he was gone so long he became concerned about him, and went to look for him, without at first finding him, but went again about 9 o'clock into an out field, after Mr. Davis' house had been set on fire, where he saw him and called to him, when he dropped the bridle which he had taken from his horse, and ran off in the direction of Mr. Davis'.

The Justice of the Peace testified that on the hearing before him the prisoner made a statement in regard to the matter of the offense charged against him, and that his impression was that he took some notes in writing of what he said, but he could not say positively, nor could he say whether he filed any confession in writing made by the prisoner before him, or that the prisoner signed any confession of the offense reduced to writing by or before him. He was then asked the general question what the prisoner then said in regard to the burning of the house.

Gray, for the prisoner, objected to the question. It was against the English rule, at least, if it was not against the rulings of this Court in such cases. By the English rule a confession made on examination before a Magistrate, must be taken in writing and signed by the Magistrate, as required by statute, 7 *Geo. IV*, c. 64, and parol evi-

dence of such a confession could not be admitted unless it is clearly proved not to have been reduced to writing, which would, of course, be the best evidence of it. *Steph. Cr. Law*, 27 *Law Libr.* 572, 573. 1 *Phil. Ev.* 82, note a. 1 *Greenl. Ev. Sec.* 227. 2 *Russ. on Crimes*, 656.

McCaulley, Deputy Attorney General, replied that such had not been the rulings in this Court.

The Court. The provisions of the statute of George the Fourth are different from those of our statute, and the rulings of our Courts have not been so rigid as those of England on the point presented in the objection. For our statute requires not only that the confession shall be reduced to writing by the Magistrate, but that he shall read it as thus reduced to writing to the accused, and tender it to him for his approval and signature; and yet our Courts have uniformly held that unless it satisfactorily appears to the Court that this has been done, and furthermore that the prisoner approved and signed it, parol evidence of the confession is admissible.

The witness then stated that he said he went over to Mr. Davis' house that night and sat down on an old and dry chestnut fence post, one end of which was under the house, and took a match out of his pocket to light a segar, and which he struck on the log and dropped on it after lighting the segar, and looking around soon afterwards he found it had set fire to some loose dry bark inside of the log and run under the house and set fire to it.

Another witness (Wm. Giles) testified that he observed the fire about 10 o'clock that night and ran over to Mr. Davis', and when he reached the house Benjamin Armstrong and the prisoner were there, and were trying to put the fire out. They were on the top of a shed covered with straw apparently made for cattle near to, but not attached to the dwelling house, which was then on fire and burning freely. The prisoner was about there all that night, and

he told him several times during the night that he must have set fire to it. He however said he did not, but the next morning after Mr. Hayes had whipped him, he asked him if he did not set fire to the house, to which he replied that he did—that he took out a match to light on a log that run under the house, and lighting it on the log it blazed right up and set fire to the house.

Gray asked the Court to instruct the jury on the evidence before them of the severe whipping which the prisoner had received that morning from Mr. Hayes, of his being dragged soon after with his hands tied behind a horse and carriage two miles to Middletown before the Magistrate, his age, color and condition in life, his ignorance and inexperience, and the improper manner in which it appeared the examination of him in regard to the accusation had been conducted by that officer, assuming his guilt as a foregone conclusion, and without any admonition or intimation whatever given him as to the rights and privileges secured to him under the circumstances, and under the charge too, for a capital offense, and dictated by a cardinal and humane precept of the law itself—even commencing it at the very outset with the abrupt enquiry, why he set fire to Mr. Davis' house, and the most of which had only been made to appear on the cross examination of the Magistrate, that it was not such a free and voluntary confession as was justly entitled to any credit or consideration, or even to admission in evidence before the jury. 1 *Greenl. Ev. Secs.* 219, 216. *Rex v. Wilson*, 3 *Eng. C. L. R.* 192. *Amer. Cr. Law* 319. 2 *Russ. on Crimes*, 648.

McCaulley, Deputy Attorney General. There were no improper means employed to induce the confession. There were no threats or promises made, or hope or idea of any benefit or advantage suggested to induce the prisoner to make it, and therefore there could be no ground for impeaching the force and validity or disputing the admissibility of it.

The Court, Gilpin, C. J., charged the jury, that a parol or verbal confession of guilt on an accusation of a felonious offense when uncorroborated by any other evidence, should always be received with scrutiny and caution, but a free, deliberate and voluntary confession when proved to the satisfaction of the jury, is entitled to great weight in determining the question as to the guilt of the accused. In this case the Court declined to rule out the parol testimony of the Magistrate in relation to the admissions made by the prisoner on his examination before him and those made also before another witness, because the rulings of the Courts of this State on that point appeared to us to require that they should be admitted. But that decision was simply on the legal question as to the admissibility of parol evidence under the circumstances disclosed of the prisoner's alleged confession or admissions; for if the jury should believe from all the evidence before them that they were not freely and voluntarily made, or were not true in point of fact, or were made under fear or apprehension of further corporal punishment and chastisement, or under the hope and belief that it would be better for him to admit the charge than to deny it, but that he did not in fact commit the crime, then they would not be bound to credit his statement and admissions, but should discard them entirely from their consideration in making up their verdict in the case. The crime with which he stands charged is arson, which is not only a felony, but a capital felony under our statute; and inasmuch as it is by the common law and by the law of this State, a well settled principle of criminal pleading that whenever a criminal offense of the grade of felony is charged in an indictment, it must be alleged among other averments that the offense was committed feloniously, and yet we are bound to say to you in this case that this allegation we find is wanting in this indictment, and for that reason we are further bound to say to you that you ought to acquit the prisoner.

Verdict—Not guilty.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* JOHN R. WILLIAMSON.

A, having four bank notes folded together in his pocket book, consisting of two one hundred dollar notes, a fifty dollar note, and a ten dollar note, went to the store of B to pay him two dollars which he owed him and told him he had come to pay it, and by mistake took from it one of the hundred dollar notes instead of the ten dollar note, and handed it to B, at the same time apologizing to him for handing him a ten dollar note in paying so small a bill. B took the one hundred dollar note, looked at it, and then went with it to his money drawer, opened it and looked in it, and then told him he could not make the change, but he would step out and get the change in the store next to his, which he did, and soon returned and handed him eight dollars as his change for it. This occurred on Thursday evening after the lamps had been lighted in the store, but A did not discover his mistake until the following Saturday, when B alleged that he had committed no mistake, that he had given him a ten dollar note, and not a one hundred dollar note, and that he returned him eight dollars, the right change for it. *Held* that if B knew that it was a one hundred dollar note, and not a ten dollar note, when he took it from A, and looked at it and went to his money-drawer with it and procured and returned to him the eight dollars as the right change for it, and designedly and fraudulently concealed his knowledge of the mistake of A from him, and afterwards concealed it and appropriated the one hundred dollar note to his own use without the consent of A, it was a felonious taking and carrying away of the note by him with that intent, and constituted the crime of larceny.

Kent County, Court of General Sessions, &c., October Term, 1864. At this term John R. Williamson was indict-

ed and tried for the crime of larceny in stealing a one hundred dollar bank note of the goods and chattels of Richard Mitchell.

Mitchell testified that on Tuesday of the week in which he lost the note, he came from Smyrna to Dover and received from the Farmers' Bank here on a check to his order for the sum of two hundred and sixty-two dollars and a few cents, (the number of which he mentioned,) two bank notes of the denomination of \$100 each, another bank note of the denomination of \$50, another bank note of the denomination of \$10, another bank note of the denomination of \$2, and the few cents mentioned in fractional currency and nickel pennies, and folded the two one hundred and fifty and ten dollar bank notes together and placed them by themselves in his pocket-book, but put the two dollar bank note in another apartment of it, and the fractional notes and pennies with some other change less than a dollar which he before had in his pocket, and returned the same day to Smyrna; and that he did not receive any other money whatever from that time until the following Saturday when he missed one of the notes of the denomination of \$100 from his pocket-book, but had in the meantime paid a small bill of not more than one dollar out of the \$2 bank note, and had used the balance of it and the fractional currency before mentioned in paying some small expenses incurred in the meanwhile. That being indebted to the prisoner in the sum of \$2, he stepped into his store in Smyrna on Thursday evening following his return from Dover, after the lamps had been lighted in it, and said to him that he would then pay him the \$2 bill he owed him, and took from his pocket-book what he intended and supposed to be the ten dollar bank note folded with the other three bank notes as before mentioned, and handed it to the prisoner who took it and looked at it in a way which led him to apologize for offering a ten dollar note in payment of so small a bill, and that he then went to his money drawer and

opening and looking into it and still retaining the note in his hand, said he could not make the change, but he would go into the store of his neighbor adjoining his and get the note changed, and immediately went out of his store and soon afterwards came back into it and handed him eight dollars in bank notes as his change for it, which he placed in the same apartment of his pocket book with the other three bank notes, and from which he had taken the bank note he handed to him; but he had no occasion to look at it or to use any of it until the following Saturday, when to his great surprise he found on again opening that apartment of his pocket-book, it contained but one bank note of the denomination of \$100, one of the denomination of \$50, one of the denomination of \$10, and the \$8 in bank notes which the prisoner had given him in change as before stated, and that instead of the \$10 note being gone from it, as he supposed and confidently expected to find, that note was still in it, and one of the two one hundred dollar notes was gone from it. It immediately occurred to his mind how it had happened, and he went to the store of the prisoner and stated to him that he had by mistake on the Thursday preceding handed him a one hundred dollar, instead of a ten dollar bank note, in paying his bill of two dollars that evening, and stated to him his reasons as already mentioned for the confidence with which he believed and alleged it. But the prisoner at once replied that the note which he received from him on that occasion was a ten dollar note, and that he gave him eight dollars, the correct amount in exchange for it, and that then and ever since he had persistently denied all knowledge of any one hundred dollar note in connection with the transaction.

The person from whom the prisoner said he procured the change that evening, was also examined as a witness for the State, but he could not remember whether he changed a note for the prisoner, or loaned him the amount of money he required for the occasion, as was

sometimes done by him under such circumstances; but he remembered that he did one or the other at his request. He positively denied, however, that he had any knowledge whatever of the hundred dollar note in question, or that he saw any one hundred dollar note in the hands of the prisoner that evening.

No testimony was produced on the part of the prisoner, except as to his good character.

Moore, Attorney General. If the prisoner through the inadvertence and mistake, and contrary to the intention of Mitchell, the prosecuting witness, obtained the possession of the \$100 note in question, and knew at the time that Mitchell had mistaken it for a ten dollar note, and by that mistake had handed it to him for a ten dollar note, without observing or knowing at the time that it was a \$100 note, and contrary to his intention, and so took and retained it and appropriated it to his own use, then it constituted a felonious taking and carrying away of the note by the prisoner *animo furandi*, or with the intent to deprive the owner of it in the manner stated, and the prisoner was in law guilty of the crime of larceny, which is defined to be the wrongful or fraudulent taking and carrying away of the goods of another from any place with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner; and asked the Court to so instruct the jury in case they were satisfied from the facts and circumstances proved that the prisoner obtained the hundred dollar note in question in the mode and manner indicated in the evidence.

Day, for the prisoner. The evidence in the case on part of the State was, at best, but purely circumstantial, and mainly based on the suspicion and conjecture merely of the prosecuting witness, for he did not pretend, nor could he venture even to say positively that he handed a one-

hundred dollar note instead of a ten dollar note to the prisoner, nor did he venture to say that he knew that he did so, and it, therefore, manifestly appeared from all he had stated in regard to the matter, that the charge was an inference only on his part from the facts detailed by him in his testimony. But no less than five days had intervened since he received the number of notes mentioned by him, on Tuesday at the bank at Dover and the following Saturday when he for the first time discovered that he had lost one of the two one hundred dollar bank notes out of his pocket-book; and during that interval, according to his statement, he had not examined or even so much as looked at that sum of two hundred and sixty dollars so carefully folded and deposited by itself in one of the apartments of his pocket-book, except when on the intervening Thursday evening he paid the two dollar bill he owed to the prisoner, and which, if his mere conjecture and presumption was correct as to the mistake he supposes he then committed, would show how exceedingly thoughtless and heedless he must be in handling one hundred dollar notes; and the memory and recollections of such careless persons were apt to be just about as defective and unreliable as their circumspection and observations are usually found to be in the transactions of their business. But the jury would observe that he at no time said that he knew that he gave one of the two one hundred dollar notes he supposes (for he did not even know that) he then had in his pocket-book, to the prisoner, and unless they could say from the evidence that he certainly did so, and that the prisoner received the identical one hundred dollar note which he lost on that occasion, and was guilty of no mistake, as well as Mitchell, in supposing that it was a ten dollar note, they could not convict him; for it was just as possible and as probable, (and the jury were bound under the humane maxim of the criminal law in such a case so to consider it,) that the prisoner, if he received it, was as much mistaken as the prosecuting witness was with regard to the denomination

of it, and might, like him, have paid it to another that very night for a ten dollar note, without discovering in the meanwhile the mistake of either of them in regard to it, and who would not have after a day or two had elapsed such means as the prosecuting witness had of ascertaining to whom he in turn by a similar inadvertence had paid it, or of charging any one with stealing it from him, and of indicting him for it in this Court. And with the exception of what that witness had so cautiously said on the ground of suspicion solely, the State had wholly failed to trace the lost note in question to the possession of the prisoner, either then or at any time soon afterwards, and which was usually the last and best link in the chain of evidence produced to fix the crime of larceny on a party accused of stealing lost property. And with such incomplete and insufficient circumstantial evidence merely to sustain the charge contained in the indictment, and the dreadful consequences which a verdict of guilty would entail on a respectable business man who has hitherto maintained a good character for honesty and integrity in the community in which he lived, as had been proved in the case, the jury could not convict him of the crime of larceny.

But he would respectfully submit to the Court that if the jury should be satisfied from such evidence as they have before them in the case, beyond a reasonable doubt, that the prisoner received the one hundred dollar note in question knowing it to be a note of that denomination, and not a ten dollar bank note, when it was delivered to him by the prosecuting witness by mistake for a ten dollar bank note, in the manner and under the circumstances stated and charged by him, still it would not be such a taking and appropriation of it to his own use, and to make it his own property, without the consent of the prosecuting witness, the owner of it, as would in law constitute the crime of larceny, but would amount to a breach of trust, merely, or a fraudulent advantage taken of the mis-

take of the witness in the settlement and payment of an account between them, for which a civil action only would lie to recover it back, as so much money had and received to his use. And neither the State, nor a criminal tribunal like this should assume the burden and expense of recovering money for a party so lost by his own admitted negligence and inadvertence in paying a small account to a creditor of his, particularly, when the proceeding in that tribunal allows the accuser to become the first and main witness to prove his own side of the case, while the lips of the accused were hermetically sealed on his side of it, so far as giving testimony in the case was concerned. Before that tribunal the prisoner was in that respect to all intents and purposes absolutely dumb.

Moore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury. The prisoner, John R. Williamson, stood indicted for the crime of larceny, and which was alleged in the indictment to consist of his feloniously stealing, taking and carrying away a bank note of the denomination and value of one hundred dollars, the property of Richard Mitchell, with the intent to appropriate the same to his own use, without his consent, as the rightful owner of it. As the prosecuting witness in the case he had fully and particularly detailed all the facts and circumstances attending the first receipt of it by him with four other bank notes at the Farmers' Bank in Dover, how much in all he received, the denomination of the several bank notes, two of them being one hundred dollar notes, one of them a fifty dollar note, one of them a ten dollar note, and one of them a two dollar bank note, how he folded the four notes first mentioned together and placed them by themselves in one of the pockets, or apartments of his pocket book on the Tuesday he received them at the bank, and that he had no occasion, according to his statement, to examine them, or to use either of them, until the following Thursday evening when he went to

the store of the prisoner after the lamps were lighted in it, to pay him a bill of two dollars which he owed him, and having in the mean time spent a portion of the two dollar note which he had received with them from the bank, but which had never been placed with them in his pocket book, and not having sufficient change about him to pay it, he told him he had called to pay it, and then took out of his pocket book, and from the apartment of it in which the four notes folded together had been kept in the mean while separate and apart and unexamined by him, what he intended and supposed to be the one ten dollar note which was folded with the others, and handed it to the prisoner who took it, held it in his hand and looked at it long enough to lead him to apologize for handing him a ten dollar note in payment of so small a bill; and that the prisoner then took it to his money drawer and opening and looking into it, said to him that he could not make the change, but he would go to the store of his adjoining neighbor and get it changed, and that he stepped out of his store, and in a few minutes returned and handed him eight dollars in several bank notes, (the number and denominations of which he stated) which he then placed in the same apartment of his pocket book from which he had taken the ten dollar note, as he supposed, which he handed to the prisoner, with the remaining three notes which he had replaced in it after handing the one he had taken from it to the prisoner. That he then left the prisoner's store, and again had no occasion to use or examine any of the notes in that apartment of his pocket book until the following Saturday, when to his surprise he discovered that the ten dollar note was still in it, but one of the two one hundred dollar notes was missing, and with the one hundred dollar note, the fifty dollar note and the ten dollar note still remaining in it, he found the eight dollars in small notes which he had received in change from the prisoner, also in it. And he had stated with great precision and minuteness how he was able, as soon as he discovered it, to account

for the loss of the missing one hundred dollar note, and the fact that the ten dollar note was still there instead of it, on the ground that he had on the Thursday evening before that, handed the missing one hundred dollar note by mistake to the prisoner, instead of the ten dollar note, as he intended and supposed he had done up to that time. That he immediately called on the prisoner and informed him of the loss and the mistake, but he in reply to it alleged that it was a ten dollar note he had handed to him on that occasion, and that he had given him the right change for it, and denied that he saw, or had any knowledge of a one hundred dollar note in connection with the payment of his bill that evening. The testimony of the other witness for the State who furnished the change or the money applied for by the prisoner, saw no hundred dollar note in his hands on that occasion, and of that he was positively certain in his recollection.

But the jury were to judge of the credibility of the prosecuting witness and the weight of his testimony, and how far they were to rely on the accuracy of his recollection and the correctness of his statement in the various particulars detailed by him in relation to the matter; and the great question of fact presented in the case, as well as every question of fact involved in it, the jury alone were to consider and determine, when he had stated what was the law applicable to them. And it was their duty to say to them that if they were satisfied from the evidence beyond a reasonable doubt, that the bank note handed by the prosecuting witness to the prisoner that evening in payment of the bill or account of two dollars due him, was a bank note of the denomination of one hundred dollars, handed to him under a misapprehension and mistake on the part of Mitchell that it was a bank note of the denomination of ten dollars, and the prisoner discovered and knew that it was a one hundred dollar note, and not a ten dollar note, when he took it and gave him eight dollars in change for it, as for a ten dollar note,

and designedly and fraudulently concealed his knowledge of Mitchell's mistake in handing it to him for a ten dollar note from him, the prisoner was guilty of a felonious taking of it in law, and if he afterwards concealed it and appropriated it to his own use without the consent of Mitchell, it constituted a felonious taking and carrying away of it with the intent to appropriate it to his own use without the consent of Mitchell, and the crime of larceny in law. If, however, the jury should not be satisfied from the evidence beyond a reasonable doubt that such was the case, they should acquit the prisoner, for he would be entitled to the benefit of any reasonable doubt they might have that such were the facts of the case; and should they entertain such a doubt, the proof of his good character should determine that doubt and the question of his guilt or innocence of the crime charged against him in his favor.

Verdict—Guilty.

THE STATE *v.* THOMAS D. BRADLEY.

In an indictment for the felonious burning of a barn not parcel of a dwelling-house under the statute, the property in the barn must be laid in the person then in the possession of it *suo jure*, for in statutory felonies analogous to arson at common law, the analogies of the common law in this respect have always been followed.

Court of General Sessions, &c., New Castle County, November Term, 1864. The defendant, Thomas D. Bradley, was indicted for burning a barn which was alleged in the indictment to be the property of John Pilling, but the proof was that although the barn and the farm on which it stood belonged to him, they were in the possession of his father, as his tenant, at the time the barn was burnt.

Gray, for the defendant. The proof cannot sustain the indictment and the defendant should be acquitted, for the law requires that the property should be laid in the person then in possession of it *suo jure*, in all cases of arson, or felony by statute analogous to it, as well as of burglary and larceny. 3 *Greenl. Ev.*, Sec. 54. 2 *Russ. on Crimes*, 488, 495. 4 *Black. Com.*, 221.

The Court so charged, *Gilpin, C. J.*, adding, such is the common law in regard to the crime of arson, or the malicious burning of a dwelling-house, or any out-house parcel of it, and it had always been recognized as the law also in indictments for statutory offenses, or felonies analogous to it; for in the latter offenses the analogies of the common law in this respect have always been followed.

COURT OF OYER AND TERMINER.

THE STATE *v.* JOHN DANBY.

Whether partial insanity can be held sufficient to exempt a person from responsibility for crime will depend upon the peculiar circumstances of each particular case. The nature, degree and intensity of the delusion, and whether the act done was committed under the direct and irresistible influence of the insane delusion, are matters of vital importance in determining the question of responsibility; for it is not always or necessarily an excuse for crime; on the contrary, it can only be so considered where it utterly deprives the party of his reason in regard to the act charged as criminal, and the prisoner's capacity or want of capacity at the time to comprehend the difference between right and wrong in respect to the very act with which he stands charged, is the test by which must be determined the question of his criminal responsibility. But the law presumes every man to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury; and insanity being matter of defense the burden of proving it to the satisfaction of the jury rests on the prisoner, unless it so appears, as it may sometimes, from the evidence offered on the part of the State.

New Castle County, November Term, 1864. At a Court of Oyer and Terminer held at this term, John Danby was indicted and tried for murder of the first degree in killing John Barnett, *alias* John Burnett, in the city of Wilmington on the eighth day of October preceding. The deceased was standing at the time on the pavement on the western side of French Street, and not far from the curb of it, with his face turned towards the other side of the street, with a small daughter of his standing by his side and whom he held by the hand, when the prisoner who was walking up

the pavement stepped up behind him to within four feet of him and shot him in the back of the neck with a pistol. The deceased instantly fell forward to the pavement his full length and face downward, when the prisoner immediately fired three more shots from his pistol at his prostrate body, and then turning had advanced but a few more steps up the pavement when he met one of the policemen of the city whom he well knew, and who had witnessed the occurrence and was hastening to the scene of it, and stepping directly up to him said, "Sam, I give myself up to you," and surrendered himself at once into his custody. The deceased never moved after he fell to the pavement and must have died instantaneously from the first shot fired at him, for the evidence showed that of the two pistol-bullet wounds found in his body, the only mortal one was produced by a small bullet which had penetrated the back of the neck near the middle line of it to the depth of three or four inches, fracturing three joints of the vertebræ and severing the spinal column. The other was in the upper part of the right shoulder blade.

The testimony on the part of the prisoner was that he had been badly hurt in the head when a boy by a fall from an apple tree on a large stone, had a severe spell of sickness in consequence of it, and in about a year afterwards commenced having spells of sadness and depression of spirit, and in those moods would forsake and avoid the sports and amusements of his youthful companions, and would refuse to join in them, even when invited and urged by them to do it, and that similar spells of despondency and depression of spirits had been marked characteristics of his ever since, and that at such times he was subject not only to melancholy, but irrational impressions, and even unfounded and unhappy delusions in regard to the fidelity of his wife, and for the last two or three years had neglected his business very much, but that in his better and usual moods he was a quiet, peaceable, kind and timid man; and on confronting the policeman immediately after committing the act, he was as pale and white as a sheet and was

so much excited and agitated that he trembled all over, and when asked by him who it was he had shot, made him no answer until he was asked the same question the third time, and then replied that it was Barnett, and when asked what Barnett, replied the street commissioner, and then when asked by him why in the name of God he had shot him, made him no answer, but on his repeating the enquiry, said to him that he had destroyed his happiness forever, and that he the policeman, knew all about it; but which was, as the latter testified, the first intimation he had ever had of such a thing from any quarter whatever.

The State called and examined in reply a number of witnesses, both male and female, who had been long and well acquainted with the prisoner, and several of whom had seen and conversed with him that day prior to the occurrence, but none of whom according to their testimony, had ever discovered or suspected the existence of any unsoundness of mind on his part; while one of the State's witnesses examined in chief testified that in a conversation which he had with the prisoner in the month of September preceding, and in which he took occasion on the deceased's passing them on the street at the time, to express a favorable opinion of him as a street commissioner, the prisoner replied that he did not like him, and that he was a mean man, or to that effect.

Moore, Attorney General. The killing having been proved to have been cool and deliberate and without even the semblance of a provocation of any kind whatever, there was nothing shown or established in the case to mitigate and reduce the homicide to murder of the second degree, or manslaughter, and therefore it was murder of the first degree under the statute, for it was clear upon the evidence before the Court and jury that it had been committed with express malice aforethought. But the *factum* of the homicide being clearly proved and established and not disputed, and that the shooting and killing of the deceased was done with a deliberately formed

design by the prisoner thus to shoot him, it was apparent that his only defense to it is that last desperate plea which is seldom pressed or relied on, until all others have failed in such cases, the defense of insanity. And on that defense he would ask the Court to instruct the jury that the proof of its existence at the time of committing the act, must be as clear and satisfactory to the minds of the jury in order to acquit the prisoner on that ground, as the proof of committing the act ought to be to convict a sane and rational man guilty of it. 1 *Archb. Cr. Pr. & Pl.* 37, 38. 1 *Whart. Amer. Cr. Law*, Sec. 711. That no partial insanity, as it is termed, had been proved on the part of the prisoner at the time of committing the act; but if there had been, and it further appeared to the satisfaction of the jury that such partial insanity had any connection in the mind of the prisoner with the act when it was committed by him, nevertheless if no provocation on the part of the deceased had been proved to their satisfaction sufficient in law to excuse or justify the act, the prisoner was criminally responsible for it, and such insanity could be no defense in the case. On the question of insanity and the nature and extent of it the legal criterion in such cases is, had the accused at the time of committing the act sufficient soundness of mind, or mental discernment and discrimination to distinguish between right and wrong with reference to it, or, in other words, to comprehend the legal criminality of it? And on that question in this case the testimony of Mr. Samuel Buck, the policeman, must be absolutely conclusive that the prisoner possessed such soundness of mind and comprehension at the time of committing the act, for instantly on the perpetration of it he turned from the prostrate body of his victim and soon meeting him on the street surrendered himself into the custody of that officer with the remark, "Sam, I give myself up to you," without being asked by him why he did so, what wrong he had done, or what crime he had committed, but on being asked by him immediately afterwards who it was he had shot, informed

him that it was Burnett, the street commissioner; and which clearly and conclusively showed that he had, not only a perfect conception of the nature and character of the act, but also a perfect consciousness of the legal criminality of it at the moment he committed it. Indeed, under the circumstances then surrounding him, with no means at hand of escape from him, it was evidence of reflection and discretion rather than insanity for him thus at once to throw himself into the arms and the custody of the law under the circumstances then surrounding him. But supposing for the sake of argument, that his wife had in point of fact been unfaithful to him, and the deceased for that reason had incurred this fatal visitation of his deliberate wrath and vengeance, with this defense of an insane suspicion and delusion on that score utterly refuted and dispelled from the consideration of the case, it would constitute no defense, or even an alleviation of the offense in contemplation of law, and the prisoner would none the less be guilty upon the evidence before the Court and jury of the crime of murder of the first degree under the statute for having committed the act with express malice aforethought. 1 *Archb. Cr. Pr. & Pl.* 22. 2 *Greenl. Ev. Secs.* 372, 373. 1 *Whart. Amer. Cr. Law* 22. For under the statute it is manslaughter still, and nothing less, even where the husband kills the adulterer when taken in the very act of adultery with his wife.

D. M. Bates (Gordon with him) for the prisoner. The rule stated by the Attorney General that the proof of insanity on the part of the prisoner at the time of committing the act, must be as clear and satisfactory to exempt him from criminal responsibility for it, as the proof of the committing of the act should be to convict a sane man guilty of it, was not law, on the contrary the rule of law upon that subject was, and should be, that if the proof on that point was sufficient to raise a reasonable doubt in the minds of the jury as to the sanity of the prisoner at the time of committing the act, he was as much entitled to the ben-

efit of that doubt, as he would be to the benefit of a reasonable doubt as to the commission of the act itself, if that were in question, or of any other reasonable doubt as to any material fact in the case which could arise on the evidence before the Court and jury, and involving the question of the guilt or innocence of the prisoner. It would therefore be the duty of the jury, if after they have heard the discussion of the facts and the evidence in the case, and the charge of the Court, and have maturely considered the same, they should entertain a reasonable doubt as to whether the prisoner was not afflicted with an insane delusion as to the adultery of his wife with the deceased at the time he committed the act, to give the prisoner the benefit of that doubt, and to return a verdict of not guilty by reason of insanity, as provided for in the statute. *Abner Roger's Case*, 7 Metc., 500.

Moore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury. After recapitulating the facts proved and not disputed in the case, and remarking that if there were no other matters to be noticed in the case, they would constitute murder with express malice aforethought and of the first degree under the statute, but as this was denied upon the ground of insanity on the part of the prisoner, he would now proceed to speak of that defense. In former times,—indeed, even as late as the early part of the last century, it was considered by the Courts that insanity, in order to protect a person from responsibility for crime, must be total in its character, either manifesting itself in wild, ungovernable, irrational and incongruous actions, or in stupid and passive imbecility. In other words, it was held that to be insane, so as to protect the party, he must have no more reason than a brute, an infant, or a wild beast. It does not seem to have entered into the conceptions of men at that early day that a person might generally behave in a perfectly sensible manner, and yet be insane upon some

one or more subjects. They do not seem to have been able to comprehend that he might be capable of reasoning well or learnedly on most subjects, whilst in respect to some one subject he might be utterly deranged. Such was the old rule of law:—a rule, severe and cruel in the extreme. And I am happy to say to you that in consequence of the improvements which have since been made in medical science and jurisprudence, more enlightened views as to the effect of disease upon the human mind have at length prevailed among men; and that under the influence of a clearer, a wiser, and more benevolent appreciation of christian obligation, the sharp severity and inhumanity of this ancient doctrine has gradually given way, and that now,—at this day, the plea of insanity stands upon the solid ground of humanity, reason and justice.

A man may be totally and permanently insane, and in such case all his acts are excused—he is incapable of committing crime. This is called general insanity. Or, he may be totally, but temporarily insane—that is, altogether insane on all subjects for a time, and insane to such a high degree that for the time being the reason, the conscience, the will and judgment are utterly overborne, overwhelmed, and obliterated, so that an act done during the continuance of the malady cannot be said to be a voluntary act, or the act of a free agent, but the mere act of the body without the consent or concurrence of a controlling mind,—being the result rather of an irresistible and uncontrollable impulse. For acts done during the existence of such a state of insanity the accused is not criminally responsible. Or a man may be but partially insane, and where this is the case, it is called *mono mania*, or insane delusion, and this insane delusion consists in a belief of the existence of certain imaginary things as facts, but which are not facts, and therefore have no existence; and which no reasonable or rational person could or would believe. Now, whether such partial insanity can be held sufficient to exempt a person from responsibility for criminal

acts will depend upon the peculiar circumstances of each particular case. The nature, the force and effect of the delusion, the degree of its intensity and controlling power, and whether the act done was committed under the direct and irresistible influence of such insane delusion, are matters of vital importance in determining the question of responsibility. It is not every wild and frantic humor of a man, or strange and unaccountable language or conduct that will show him to be laboring under insanity. The law requires something more than this. Nor is partial insanity, or insane delusion always or necessarily an excuse for crime. On the contrary, it can only be so considered where it utterly deprives the party of his reason in regard to the act charged as criminal.

The question is not whether he was insane upon any subject whatever, but whether he was insane in respect to the particular act alleged as constituting his offense. If it were otherwise, there would be an absolute immunity from punishment for crime committed under any species of insane delusion whatever, although such insane delusion might not in any degree becloud or obliterate the mental capacity of the accused to distinguish between right and wrong in regard to the particular criminal act with which he stands charged. If he is capable at the time of distinguishing between the right and wrong of that act—if he knows and understands that that act is wrong, he is responsible. But if he has not at the time a sufficient degree of reason to distinguish between the right and wrong of that act—if he does not know and understand that that act is wrong, he is not responsible. And therefore, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, if he has a knowledge that it is wrong, and mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he will do wrong, such partial insanity is not sufficient to exempt him from responsibility for

crime. This doctrine has been fully and clearly established by numerous well-considered decisions, both in England and in this country. The enquiry, therefore, in such cases, as you must have already perceived, must always be brought down to the simple, but sharp question of the sanity or insanity of the accused, at the time and in respect to the criminal act done by him. In this case the criminal act charged against the prisoner at the bar is the felonious killing of John Barnett, with express malice aforethought. To this charge the prisoner sets up the defense that at the time he did the act he was an insane man, and on this ground he claims an acquittal at your hands.

And now, gentlemen of the jury, having made these few remarks touching the subject of insanity generally, and in explanation of the principles of law involved in the proper consideration of the question at issue, I now proceed to state to you briefly those rules and tests by the light of which it is your duty as good citizens and sworn jurors to be guided in investigating and considering the evidence before you, and in making up the verdict which you shall feel yourselves constrained to return as the conscientious result of your deliberations. These rules are but few in number, and are as plain and simple as the nature of the subject will admit of. They, in fact, substantially, embody all the learning and all the law on this subject. Whatever difficulty or embarrassment you may encounter in your investigations will, I am sure, mainly arise in applying the facts before you to the law of the case. I do not know that you will have any difficulty of the kind, but if you should, I feel very confident that a careful examination and consideration of the testimony, coupled with an honest and earnest purpose of mind and heart to arrive at the truth, will lead you to a just and satisfactory conclusion of your labors. The first rule, gentlemen, is this: Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satis-

faction of the jury. This rule is primary and fundamental. It meets and challenges your attention at the very threshold of your enquiries. The prisoner at the bar, therefore, is to be considered by you to be a sane man and capable of committing crimes, until the contrary be clearly and satisfactorily established by the evidence. You will therefore, gentlemen, take this rule with you as the very ground upon which you must stand in prosecuting your enquiries upon this question. Secondly,--Insanity being matter of defense, the *onus* or burden of showing or proving it lies on the prisoner. It is true such proof may sometimes arise out of the evidence offered by the State, but if it does not so arise, it must be made out from distinct evidence offered on the part of the prisoner; in either case it must be clearly sufficient to prove the fact of insanity, otherwise the presumption of sanity, or soundness of mind will stand unrebuted and in full force. But to establish a defense on this ground, it must be clearly proved that at the time of committing the act of killing, the prisoner was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was then doing, or, if he did know it, that he did not know he was doing what was wrong. If, therefore, this condition of insanity has been clearly and satisfactorily established by the evidence you ought to acquit the prisoner. If, on the contrary, he has failed to establish clearly and satisfactorily such a condition of insanity as I have described, it will be your duty, however painful, to return a verdict of guilty in manner and form as he stands indicted. I say guilty in manner and form as he stands indicted, because if guilty at all, he is guilty of murder in the first degree.

You thus perceive, gentlemen, that the prisoner's capacity or want of capacity at the time to comprehend the difference between right and wrong in respect to the very act with which he stands charged, is the test by which must be determined the question of his criminal responsibility.

I have now finished what I had to say on the law of this case. It is the duty of the Court to explain the law to the jury. I have endeavored to discharge this duty according to my best judgment and most conscientious convictions. But your duty, gentlemen, which commenced with mine, is not yet ended; the most important part of that duty yet remains to be done; and I pray God that he will not only impress your hearts with a due sense of the solemn responsibilities which now rest upon you, but that he will also be pleased to enlighten your minds by imparting to you some portion of his own great wisdom, so that you may be enabled to arrive at the very truth and right of this cause, and a true verdict give according to the evidence.

Verdict—Not guilty by reason of insanity.

THE STATE *v.* EBENEZER W. FRAZIER.

On an indictment and trial for the murder of one who has been shot, a declaration made by him twenty-five or thirty minutes afterwards, and after he had been carried from the place to his home, and been undressed and laid on his bed, that the prisoner shot him, and how he did it, is not admissible in evidence as a part of the *res gestæ*.

After proof by several witnesses on the preliminary enquiry before the Court that the deceased had declared on Saturday and on Sunday and again on Monday preceding his death on the following Friday, that he could not live, that he could not recover, two affidavits, the first made on Saturday and the second on Monday by him and taken by a Justice of the Peace in his bed chamber, declaring that the prisoner shot him, and the circumstances under which he assailed and shot him, admitted in evidence as dying declarations of the deceased.

But on such preliminary enquiry before the Court to ascertain whether the deceased was under a due sense and apprehension of impending dissolution at the time when they were made and the affidavits were

taken, it is irregular and contrary to the practice of the Court after the examination and cross-examination of the witnesses for the State on that point, to allow a witness to be called and examined on the other side to rebut or controvert their testimony. Such dying declarations, however, when admitted in evidence to the jury may afterwards be rebutted and controverted by the testimony of witnesses called on the other side in their regular course of examination; and if it is then proved that the deceased subsequently expressed hope of recovery, the weight and effect of such declarations before the jury will be very much weakened and impaired by it.

Murder with express malice aforethought, and of the first degree under the statute defined; also murder with malice aforethought implied by law, and of the second degree under the statute, and manslaughter defined.

When the killing is admitted the law presumes that it was done with malice aforethought, and it is incumbent on the prisoner to show that it was not by proof of such provocation or alleviation as will suffice in law to rebut the existence or implication of malice, unless it so appears from the evidence adduced against him in the case.

New Castle County, May Term, 1865. At a Court of Oyer and Terminer held at this term, Ebenezer W. Frazier was indicted and tried before Wootten, Houston and Wales, Judges, Gilpin C. J., absent on account of sickness, for the murder of John A. Eliason in the first degree, at Middletown, on the 9th day of December 1864. The deceased, whose wife was a sister of the prisoner, resided with his family and was engaged in the mercantile business in that place at the time. From the evidence it appeared that his domestic relations had not been happy, although no open rupture or separation had occurred between him and his wife in consequence of it, but notwithstanding this had produced unfriendly relations between him and other members of her family, the prisoner had always continued on the most friendly and intimate terms with him, and on all occasions of dissatisfaction or alienation between them, had uniformly sided with the deceased, until the occurrence in question, although his affection for his sister and his frequent and friendly visits to their house had been apparently in no degree diminished or affected by it. The residence of

the prisoner was in Maryland, several miles from Middletown, but he had arrived there in the evening train on the preceding day, and spent the night at their house, and the whole of it up to twelve o'clock, in friendly conversation with the deceased in his sitting room a greater part of the time, and afterwards with him and his sister in her bed room, who was too unwell to leave it, when they respectively retired to their separate rooms for the rest of it. The next morning he arose early and breakfasted at the hotel, but soon afterwards returned to the house of the deceased, and went up stairs to the room of his sister where he found them together with one of their sons, a lad ten or eleven years of age, and invited the deceased to take a ride with him to his mother's over in Maryland, which he declined, as he was not feeling very well, when he invited the son and asked the consent of both the father and mother for him to go with him, which they gave; he then asked the deceased for the loan of his horse and buggy for the purpose, which were obtained, and soon afterwards the prisoner and his nephew started on the drive and were gone until about four o'clock in the afternoon. During their absence they visited and dined at his father's, and he was alone for some time in a room with his mother to which they retired from his nephew and the others at the house. On their return they stopped at the hotel at the Head of Sassafras, where the prisoner took during their halt there three drinks at the bar. He then drove back to Middletown and to the hotel of Mr. Davis where he left the horse and buggy and his nephew to drive them home, and went into the bar-room and took a drink, and soon afterwards left it and walked to the house of the deceased and up to Mrs. Eliason's bed room where she then was, and enquired for John (meaning John A. Eliason) and where he was, but who had just before left it and gone down to the sitting room below it by another stairway as he went up to it. He then descended the stairs and entered the sitting room shutting the door of it behind him, at the same time the son of the deceased

before referred to, left the sitting room by a door opening on an alley and stood under the window of it with his back towards it and looking on the street. Just after he had left the sitting room a colored woman and a servant in the family, entered it with a message from Mrs. Eliason to Mr. Eliason that she wished to see him in her room up stairs, when she found no one in it but Mr. Eliason and Mr. Frazier, and who described their respective positions in it as follows: Mr. Eliason was seated in a chair by the fire-place with his hat on, his legs crossed, and with his hands clasped across his knees and leaning forward with a segar in his mouth, while Mr. Frazier was standing at the end of the mantel-piece with one elbow resting on it and the other arm akimbow, between Mr. Eliason and the door leading into it from the entry and with his back turned towards the door. She delivered the message to Mr. Eliason and left, but had not returned up stairs more than a minute or two when she heard the report of a pistol, and looking out of a window over the alley saw Mr. Eliason running from it and Mr. Frazier after him. She had heard no words and no noise of any kind in the sitting room, either before or after she left it to go up stairs on that occasion, and this was corroborated by the testimony of the son who had been standing in the mean while and only for a few minutes under the window of the sitting room in the alley as before mentioned, when his father suddenly jumped from the door of it into the alley with the cry of murder, and ran down it pursued by his uncle with a drawn pistol in his hand, and which he first fired at him as his father passed him (the witness) in the alley, and before he reached the alley gate and when he was but a few feet behind him, and which he afterwards fired at him three times whilst he was pursuing him in the street.

It was further proved by other witnesses that they were walking down the street towards the railroad depot about half-past four o'clock that afternoon, when their attention was called by the cry of "murder! help! help! gentlemen!" to two men who had just come out of a side door

of the house of the deceased, both running down the alley without their hats, and one of them pursued by the other and not more than eight or ten feet from him. The foremost one had about reached the gate of it when they first heard the report of a pistol, and as the chase passed into and along the street they saw the prisoner, whom they recognized and identified as the person who was pursuing the other fleeing from him, fire a pistol three times afterwards at him just about as fast as a revolver could be successively fired by a man when running. Another witness, Mr. Martin E. Walker, a particular friend of the deceased, had heard the reports of the pistol and had by this time reached the side of the street, when he saw the deceased running slowly and feebly towards him with one arm and hand behind him and the other uplifted and extended before him, and ran to meet him, and just as he reached him, he exclaimed as his legs seemed to give way under him, "catch me Martin!" and fell into his arms. He at once asked him what was the matter with him, and he answered that he was shot. He then asked him who had shot him, and he replied "Eben Frazier;" but the prisoner had then disappeared from the street, and was not in sight of the witness when he reached the side of it. Both the prisoner and the deceased were without their hats when they leaped from the sitting room door and during the chase in the alley and on the street, but the prisoner returned from it to the house of the deceased and was heard to say as he re-entered the alley "now let them come on with their d——d officers and arrest me as soon as they may!" But he soon afterwards reappeared on the street in his hat, and went to the hotel and not only took a drink, but invited others to drink with him without any effort made in town to arrest him; it was now dark, however, and he must have soon afterwards left it, for by half-past nine o'clock that night he was at Bear Station, sixteen miles up the railroad from Middletown, where he got on a freight train and rode to Wilmington, but being suspected by the officers of it who

had heard of the shooting of the deceased while the train was at Middletown, although he was personally unknown to them, he was through their instrumentality arrested for it on the arrival of the train at Wilmington. The prisoner until recently had been the U. S. Deputy Provost Marshal of the district in Maryland in which he resided, and the revolver with which the shooting was done was the same which he had whilst in office and since usually carried about his person.

The deceased was at once carried to a drug store near at hand and a physician sent for who found two small bullet wounds on his body, one entirely through the posterior part of the thigh of his right leg, and the other in his back about two inches above his right hip and about the same distance to the right of the spinal column, in which the bullet had penetrated and lodged in the body and which on probing could not be found. By his direction he was then removed to his own house, and in undressing him, a small four-barrelled pistol fully charged was found in his coat pocket, and which it appeared from the evidence he had been habitually carrying about him in the inside pocket of it for a month or more at that time. He languished in severe agony at times for one week, or until the following Friday when he died, the wounds having been inflicted on the preceding Friday afternoon. During the examination of the witnesses on behalf of the State, the attorney general propounded the enquiry to one of them who had assisted in undressing the deceased after his removal from the drug store to his residence, what statement he then made in his presence in regard to his having been shot, and by whom and how it was done.

T. F. Bayard, for the prisoner, objected to the admissibility of any declaration then made by the deceased in regard to the matter after the length of time which had elapsed since the shooting.

Moore, Attorney General. The statement or declaration he propped to prove was made so soon after the deceased was shot by the prisoner, that it could and should be considered as contemporaneous with the main fact under consideration, and was therefore properly admissible in evidence as a part of the *res gestæ* under the well settled rule of law on that subject. 1 *Greenl. Ev. sec.* 108.

Bayard, in reply, cited 3 *Phil. Ev. Cow. & Hill's Notes*, 1 Part 207.

The Court then enquired and learnt from the witness that a period of not less than twenty-five or thirty minutes had elapsed between the time of the shooting and the removal of the deceased from the scene of it, and of his being undressed and laid to bed in his own bed chamber, after which the statement referred to had been made by him, and were of opinion that under the circumstances and after such a length of time having intervened, that it did not properly constitute a part of the *res gestæ*, and that it was therefore not admissible in evidence.

A witness for the State who sat up with the deceased on the succeeding Saturday night and Tuesday, testified that on one or the other of those occasions when he enquired of him how he (the witness) thought he looked, to which he replied, better, although he did not think so, the deceased then said he was there for his winter quarters, and also said that he did not think he would recover.

Another witness testified that he heard him say as they laid him on his bed after bearing him home from the drug store and undressing him, "Gentlemen, it is all of no use, this is my death bed." And that he afterwards told him to take good care of his keys, that one of them was the key of his safe, and his safe contained papers which would be very important to his children. And again on Sunday he heard him say he could not live. He heard him praying also on Sunday, and several times afterwards, but never

before that time, although he had lived in his family for several years past. He was not a member of any church.

A brother of the deceased also testified that he said to him on Sunday afternoon, that he could not live or recover from his wounds.

Another testified that he heard him say on Monday that he could not recover. And another that he had twice heard him say the same, once on Saturday and again on Sunday. It was then proved that he sent on Sunday afternoon for a friend for the purpose, and had an alteration made in his will; but on cross examination he stated that he said nothing to him about dying, or expressed any apprehension of death whilst he was with him.

As all this was understood to be but the prelude to an offer on the part of the attorney general of certain declarations in evidence afterwards made by the deceased and reduced to writing at the time.

Mr. Bayard said he had a witness whom he would like the Court to hear before it passed upon the important question which was now about to arise in the case, from whose testimony, if he was correctly informed, it would appear that the deceased was not impressed with the apprehension of death, but was still hopeful of living and surviving his wounds when the declarations were made; and asked the Court that he might now be called to the stand and sworn.

The Attorney General objected that it was altogether irregular and contrary to the established practice of the Court in such cases. It was not, however, the first time that such an application had been made in a similar case in the Court of Oyer and Terminer in this State, for identically the same application was made to and refused by

a majority of the Court, one Judge only dissenting, in the case of the *State v. Cornish* for the murder of Saulsbury, 5 *Harr.* 502.

The Court, after consideration, refused the application and excluded the witness and his testimony at this stage of the trial on the ground of its irregularity and the long established practice of the Court to the contrary. This would not appear to be as strong a case for the prisoner for such a ruling as we are now asked to make, as was the case of the *State v. Cornish* cited by the Attorney General, and yet in that case a majority of the Court overruled and refused a similar application. As to the admissibility in evidence of dying declarations, as they are usually termed, in such cases, it is of course the province and the duty of the Court to pass upon and determine the preliminary question whenever it is raised, whether they were made under such an apprehension of impending death from the wound or injury received, as will entitle them in their opinion to be admitted in evidence to the jury according to the rule of law on that subject, and the practice of this Court as it has hitherto always been, and such as we believe has also been the general practice both in the Courts of this country and of England, to determine that preliminary question for or against their admissibility in evidence to the jury, on the *prima facie* proof presented on that point by the direct and cross-examination of the witnesses produced by the State to establish it, without hearing any witnesses on the other side to rebut or controvert it; and in view of the great and vital importance of their decisions in such cases to the accused, we believe we can further say that the Court has always felt the full weight of the solemn responsibility devolved upon it in every such instance. But after all, when they are clearly and conclusively entitled to it, and are duly admitted in evidence in the case, they rest on the same level with all the other evidence in it, and the credit, weight and effect of them are alone to be considered and determined by

the jury; and they may after their admission in evidence be weakened and impaired, contradicted and disproved by the witnesses and the testimony for the prisoner subsequently produced on his behalf in the trial.

The Attorney General then offered in evidence two affidavits, the formal proof of which had already been produced in the case, made by the deceased and taken by Jesse Lake, a Justice of the Peace of the county, one of them on Saturday and the other in the afternoon of Monday after he was shot, each of which had been drawn by him in writing at the instance and dictation of the deceased, and read over to and approved and signed by him, and to the truth of which he had afterwards been formally sworn by him on the days before mentioned, and which contained a statement of the facts and circumstances by the deceased under which the prisoner made the attack upon him and shot him, and which he contended were admissible in evidence, not as affidavits, or by virtue of the sanction and solemnity of the oath under which the Justice of the Peace had unnecessarily taken them, but as dying declarations, or a solemn statement made by the deceased in regard to the matter under a solemn and profound apprehension of impending death; and in case of the last and more important one only four days before he died. 1 *Greenl. Ev. Sec.* 156. *State v. Thaughey*, 4 *Harr.* 562. 1 *Arch. Cr. Pl.* 141 n. 1. 1 *Arch. Cr. Pl.* 452. 1 *Greenl. Ev. Sec.* 158. 1 *East's Pl. Crown* 354. 2 *Ld. Cr. Cases* 238.

Bayard objected and contended that they were not such declarations as the law required in such a case, and were therefore not admissible in evidence to the jury. 3 *Phil. Ev. Cow. & Hill's Notes*, 1 *Part* 252.

Moore, Attorney General, in reply, cited 2 *Stark. Ev.* 262.

The Court. This is often a very nice as well as a very grave question, for the rule of law which governs it is not

unfrequently of difficult application. These papers are offered in evidence as the dying or death-bed declarations of the deceased in regard to the time, place and manner in which he was attacked and shot by the prisoner at the bar, while he was yet languishing under the fatal wound received at his hand, and only four days before his dissolution in consequence of it. In such a situation and in view of that death which he fully apprehends and believes in his own mind to be surely and inevitably approaching and near at hand, the conscious solemnity of the occasion and his duty to speak the truth, and nothing but the truth, is rightly assumed in law to invest his declarations made under such circumstances with as high a sanction and as much credibility, as if made under the obligation of an oath duly and formally administered in a court of justice under ordinary circumstances; and the rule of law on the subject to which we have alluded we understand to be that whenever such declarations are offered in evidence in a trial like this, that to warrant their admission it must first appear to the satisfaction of the Court that they were made by the deceased under the apprehension of impending death, although it is not essential that he should then apprehend immediate dissolution, for it is sufficient if he at the time apprehended it to be impending. 2 *Stark. Ev.* 459. This is the rule as stated by Mr. Starkie. And although Mr. Greenleaf whose work on evidence has also been cited, also says that the length of time which elapsed between the declaration and the death of the declarant, furnishes no rule for the admission or the rejection of the evidence, he qualifies it with less precision and certainty by adding that it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is not admissible. On the other hand, a belief that he will

not recover, is not in itself sufficient, unless there be also the prospect of almost immediate dissolution. 1 *Greenl. Ev. Sec.* 158. In the original work of Phillips on evidence it is thus stated, "but before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved that the deceased, at the time of making them, was conscious of his danger, and had given up all hope of recovery. And that the question, whether the deceased made the declarations under the apprehension of death, is a question for the Court to determine, not the jury." 1 *Phil. Ev.* 200. In this case it appears from the testimony of the several witnesses who have been examined on this point particularly, that on Saturday, Sunday and Monday, during the time embraced in the two affidavits and up to the time when the second one was taken, the deceased had repeatedly declared his belief that he must die, and that he could not recover from the wounds he had received, and that on no occasion during that time, or afterwards so far as we are informed, did he allude to the subject without expressing that conviction in a manner which leaves no room for any doubt or misgiving on our part as to the entire sincerity and solemnity of that conviction on the part of the deceased, or of the fact that they were uttered by him under the hopeless and despairing impression that his death was then imminently impending as the inevitable result of them. It is, therefore, the opinion of the Court that the evidence offered by the Attorney General is admissible.

Both of the affidavits or depositions were then read in evidence, but as the second substantially included all that was contained in the first and was much fuller in its statements, it alone is here given, and was as follows:

MIDDLETOWN, Dec. 12th, 1864.

John A. Eliason further deposes and says that Eben W. Frazier came to his house Thursday afternoon, the 8th day of December, 1864, and in conversation with him, he the said Eben W. Frazier told him that he had come to

Middletown to kill a man, and during the evening they talked over matters in a friendly manner respecting Mrs. J. A. Eliason, and that the said Eben W. Frazier agreed with him on the subject, and said he would stand by him, or back him. When going to bed his suspicions, however, were somewhat aroused and he closed the avenues leading from the room in which Eben W. Frazier slept, and his own room in which he slept. On Friday, 9th of Dec., 1864, the said Eben W. Frazier proposed that he should take a ride with him, and he told him he could not go, but that he could have his horse and carriage, and that he accepted the offer and took with him his son, Frank Eliason, and returned about the middle of the afternoon driving past his house towards the hotel, and that Frank brought the horse and carriage home; after which the said Eben W. Frazier came back to his house and went up stairs to the room occupied by Mrs. Eliason, after which he came down stairs and came into the room where he was sitting on the rocking chair, and that they in a friendly manner talked over the matter which they had talked about the afternoon before, and that he acquiesced in what he said to him. After which he went up to Mrs. Eliason's room again, but soon came down again into the room in which he was sitting and enquired for his cane which was shown him, when he took it up and then took a seat in a chair beside him, and putting his hand on him, said to him that he had told Ella that he would have no fuss with him, for he had always found him a reasonable man; but he thought it would be better if she could remain with her little children, when he replied to him that probably it would be, if he could have an assurance that there would not be a repetition of the past, which had occurred two or three times already, when Frazier looked up at the clock and said it was near car-time, to which he replied "it wanted twenty minutes yet, stay, we will soon have some supper," when he replied he did not want any, then he immediately jumped up and drew his revolver and said, "John! I am going to kill you right

here!" He asked him what for? He said "I don't know." Whereupon he rose up from his seat and remonstrated with him, to which he replied and said that he had come down expressly to kill him; he then asked him if that was still his determination, he said yes, he then made for the door and shut it after him, and ran out into the alley, and then into the street, and that Frazier ran after him and shot him with one ball in the alley, and shot at him two or three times after he had got into the street, hitting him with another ball in the street.

JOHN A. ELIASON.

Sworn and subscribed to, Dec. 12th, 1864, before
JESSE LAKE, J. P.

Mrs. Ellen Hanson was then sworn and testified that she was at Mr. Eliason's house that day, between 4 and 5 o'clock in the afternoon, up stairs in Mrs. Eliason's room, who was very sick, and remained from ten to twenty minutes. While there a gentleman came up stairs into her room, and soon went down again, who she told her was her brother after he went out, and whom she now recognized as the prisoner at the bar. He soon came up again into her room, and said to her it was near car-time, and he must leave. He then bade her good-bye, and she asked when he would come again, and he said in two or three days, and then went out and down stairs again. She left in about five minutes afterwards, and had not got across the street before she heard the report of a pistol and others soon afterwards, but did not see where they came from. The State then proved by a servant in the family that she was in the sitting room in an hour and a half or two hours after the deceased was shot, and there was then no derangement in the furniture of it, or other indication of any scuffle or personal collision having occurred in it between the prisoner and the deceased.

The coroner of the county testified that he held an inquest on the dead body of the deceased the day after his

death, and produced the two pistol bullets which were proved before him in the inquest to be the bullets with which he had been shot. He also had a *post mortem* examination made of it by Dr. Chamberlain and Dr. Barr, who had been in professional attendance on him from the day he was shot until his death; and who were next called to the stand and testified that the bullet wound in the right thigh was neither mortal or serious in its character, but that the bullet which struck him in the back about two inches to the right of the spinal column and about two inches above the right hip, had penetrated the body to the depth of six or eight inches, and passing through the grand colon or intestine, had lodged in the cavity of the abdomen in about an inch and a half of the navel on the right side where it was found. Inflammation of the colon and the other part penetrated by it ensued in a few days and that was the cause of the death. That wound was a mortal one and caused his death. He had not been well the day he was shot, and was very much exhausted by his wounds from the first.

The Attorney General here rested the case and the counsel for the prisoner after his opening to the Court and Jury and reading the statutory definitions of murder of the first and second degrees, and also the provision that a person indicted for murder of the first, may be convicted of murder of the second degree, or of manslaughter, and stating that he would be able to prove that the act was committed without previous malice or premeditation, that the parties were brothers-in-law, and had always been on the best and most friendly terms up to that unfortunate moment, that the prisoner had been drinking very hard that day, and was intoxicated and was so much so as not to know what he was doing at the time; and in addition to that he hoped to be able to satisfy the jury that such a sudden and fatal assault could not have been committed by one such warm friend and brother-in-law upon another, without some altercation and personal collision and

conflict of violence having suddenly occurred and preceded it between them, he proceeded to call and examine several witnesses.

A son of the deceased, seventeen years of age, testified that his father and his uncle, the prisoner, had always been good friends, and he believed that he had always agreed with his father in all matters of difference or dissension which had arisen in the family, and that they belonged to the same political party, and were both Union men.

A colored woman testified that she had lived all her life a servant in the family of the deceased, that the prisoner had been a frequent visitor in it, and he and Mr. Eliason had always been very friendly with each other. That the prisoner came to the house about seven o'clock the evening before Mr. Eliason was shot, and when she went to bed between 9 and 10 o'clock, they were sitting in the dining room together talking; the next morning Mr. Eliason came down stairs first, and afterwards Mr. Eben Frazier came down when Mr. Eliason invited him into the dining room to take a drink, and they went into the room together, that was when he was about starting off in the carriage with Mr. Eliason's son Frank, and that they seemed then very friendly. She thought Mr. Frazier was intoxicated when he came back to the house that afternoon; he staggered, and Mr. Eliason looked as if he had been drinking, he looked so about his eyes; he had been drinking some the day he was shot. She did not see either of them drink that morning when Mr. Eliason invited Mr. Frazier into the dining room to take a drink, because she did not go or see in the room, but she saw Mr. Eliason drink once that morning when she took the pitcher of water to him; she did not, however, see him drink any more that day.

Edwin S. Morris testified that he lived in Maryland, and that between 2 and 3 o'clock in the afternoon of the

9th of December last, he met with the prisoner whom he had long been acquainted with, at the Head of Sassafra, and took two drinks in company with him at the hotel there, and that he was intoxicated at that time. That he and his brother then drove on to Middletown that afternoon, the prisoner driving on behind them up to Davis' hotel there, where he got out of his carriage and took another drink. His brother was going up that afternoon in the cars, and the prisoner told his brother that he was also going up in them, and just as he was about driving off he heard him tell his brother on the hotel porch there that he was going up to bid John A. Eliason good-bye and would meet him at the depot.

Dr. Wm. H. Barr testified that he was well acquainted with both the prisoner and the deceased. That they had always been good friends, and that Mr. Eliason had told him that Mr. Frazier had always sided with him in his family difficulties.

Mrs. Ellenora M. Eliason testified that her brother, Ebenezer W. Frazier, came to their house in the afternoon of the 8th of December last, on the arrival of the train, but her husband not being in at that time he went away and came back after tea and after Mr. Eliason had come home. She was then sick in her room up stairs above the sitting room, and he and her husband remained in the sitting room until about 12 o'clock, when they came up to her room together, and remained in it with her for about a half hour, and then they each retired to their rooms for the night, but before they left he invited her husband to take a ride with him, the next morning, which he declined on account of her sickness. They were in her room together again the next morning before breakfast, when her husband invited him to remain for breakfast, but he did not, and her husband said to him while they were then in her room that if he would stop drinking, he would be one to set him up in business. They were quite intimate.

After he came back in the afternoon from the Head of Sassafras he came to her room for a few moments and left, but came back again in about a half hour to bid her good-bye, saying he would write to her. He was intoxicated, so much so then that he staggered and fell on her bed, and repeated the same words over several times. He then went down stairs and after a while she heard a rattling in the sitting room below, but what occasioned it she could not tell. After she found that he was so much intoxicated, and after he had gone down stairs the second time, she sent a servant down stairs for her husband, fearing not for him, but for the prisoner's wife who was then staying with them, and who she did not wish to see him in such a condition, as she knew how much it would distress and mortify her.

Walter L. Fountain testified that he had known the prisoner ten or twelve years, and was with him at the hotel in Warwick where he halted on his way down to his father's pretty early in the morning of the 9th of December last, and drank twice with him at the bar while there, and observed that he was under the influence of liquor as soon as he saw him, and that he was then about half and half. He did not stagger; but it was not from his gait, but his conversation that he could judge when he was under the effects of liquor.

Lawrence R. Davis was then called to the stand and testified that he sat up with Mr. Eliason from time to time after he was shot, and he told him on Thursday morning, he was then on his easy chair, and they all thought he was in a very bad way. They put him on his bed, and in a little while back again on his chair, when he had a good evacuation of his bowels, after which he said to him "how good that feels, I begin to feel like myself again." That night his brother, William C. Eliason, was there and asked him if he would say that Eben W. Frazier shot him, but he did not answer the question until he asked it the third time. He then answered it, and said "he did, I always said he did." His brother

then said "gentlemen take note of that." He then left the room, and John A. Eliason then said to him, "Larry, why did my brother ask me that question? He must think I am going to die, I hope not." That was all he heard him say. He never expressed any fears of death in his presence.

The uniform tenor of the testimony on the part of the State was that the prisoner had been drinking, but was not drunk that day.

Higgins, Deputy Attorney General, contended that on all the facts and circumstances proved it constituted a case of murder committed with express malice aforethought, and of the first degree under the statute. *Whart. Amer. Cr. Law, Secs. 930, 1103. 9 Met. 107.*

T. F. Bayard, for the prisoner, contended that it was not a case of murder committed with either express, or implied malice aforethought, or of the first or second degree under the statute, but a case of manslaughter. *Whart. Amer. Cr. Law, Secs. 360, 374, 989. 2 Stark. Ev. 515, 523, 525. Ros. Cr. Ev. 736, 739. 1 Russ. on Crimes, 465. 1 Stark. Ev. 502, 526. 2 Lead. Cr. Cases, 522. 1 Phil. Ev. 437. Whart. Amer. Cr. Law, Secs. 47, 431. 1 Arch. 902. Ros. Cr. Ev. 724, 729. As to the dying declarations and affidavits given in evidence, he cited 2 Lead. Cr. Cases 240, 243. 1 Arch. 455.*

Moore, Attorney General, in reply, cited *2 Stark. Ev. 515. 1 Hale's 452. Whart. Amer. Cr. Law, Secs. 945, 948, 1111, 1113. 2 Stark. Ev. 488, 489. Hawk. 451. 1 Arch. 846. Whart. Sec. 1103. 1 Arch. 844. 9 Met. 103, 107. 5 Cush. 295. Whart. Sec. 1109. 1 Arch. 832. 1 Bish. Secs. 300, 301, 302.*

The Court, Wooten, J., charged the jury. This protracted and tedious case, with its arduous labors, has devolved upon you and upon the Court the most important and responsible duty that ever engages the attention of

the Court and jury. It is of the most vital importance to the prisoner at the bar, because his life is involved in the issue. And it is of very grave importance to the community, because the maintenance of the criminal law is essential to the security and protection of the lives of our citizens, and for the preservation of the peace and good order of society. You cannot, therefore, fail to perceive that this case which is about to be submitted to you for its final consideration and determination, is of the gravest character in every respect, and therefore requires your most serious attention and deliberative consideration. In your deliberations you should not allow any rumors, prejudice or outside influence to operate upon your minds in making up your verdict, but you should confine your investigation entirely to the evidence and the facts as proved in the case. The law you will have from the Court and the facts have been given you by the witnesses from the stand, and it is your duty to apply the law, as I shall expound it, to the facts and make up your verdict accordingly.

With these preliminary remarks, I shall proceed to state to you as plainly and briefly as I am able, the law applicable to the case.

The prisoner at the bar, Ebenezer W. Frazier, has been indicted and is now on trial for murder of the first degree, which is one of the highest grades of crime known to our law. He is charged with the commission of this crime by shooting John A. Eliason, at Middletown in this county, on the ninth day of December last, with a pistol, thereby inflicting a mortal wound in the back of the deceased near the spinal column, of which wound it is alleged he died on the sixteenth day of the same month.

To this indictment the prisoner has pleaded that he is not guilty, and the simple, but important issue which you have been sworn to try is whether he is or is not guilty.

Murder is the killing a human being with malice aforethought, either express or implied by law; the malice in all cases of homicide constitutes an essential ingredient

of the crime, and in the absence of both express and implied malice the homicide falls below the crime of murder of either degree, and amounts to a crime of lower grade (if any).

At common law there is but one degree of murder, but our statute divides the crime into two degrees, denominated the first and second. This statutory division of the crime varies it slightly from its character at common law; the difference, however, is chiefly in the punishment which the law inflicts upon offenders. To convict the prisoner of murder of the first degree, it is necessary that it be shown to the satisfaction of the jury that the homicide was committed with express malice aforethought, and if the jury should not be satisfied that this species of malice existed in the heart and mind of the prisoner when the fatal shot was fired, he will not be guilty of murder of the first degree, express malice being an essential and necessary ingredient to constitute that crime. But although the evidence may not be sufficient in the opinion of the jury to raise the crime to its highest grade, it may satisfy you of the guilt of the prisoner of the lower grade of the offense, that is, murder of the second degree, which may be committed without the existence of express malice, when the facts and circumstances surrounding the case are such that the law will imply malice.

You will remember, gentlemen, that there are two kinds of malice aforethought, that is, express malice and malice implied by law, and it may be necessary in your deliberations to observe this distinction for the reasons which I have already adverted to, and here it becomes necessary that I should explain to you the nature and character of express malice and malice implied by law.

Express malice is, when one person kills another with a sedate, deliberate mind and formed design, being evidenced by external circumstances, discovering the inward intention, as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party slain some bodily harm.

Malice is implied by law from any deliberate and cruel act committed by one person against another, however sudden, as where one person kills another suddenly without any or without a considerable provocation. The reason why the law implies malice from such wanton, deliberate and unprovoked acts of cruelty is, that they cannot be reconciled upon any principle of humanity.

Having explained to you what in law is termed express malice and what is denominated implied malice, I will endeavor to assist you in applying the facts to the law, without, however, expressing any opinion in reference to the evidence, as it is not the province or desire of the Court to do so, but it belongs exclusively to you to pass upon the evidence and to give to it such weight and effect as in your best judgment it is entitled to. I shall only, therefore, allude to the facts in such wise as may be necessary for illustration.

The prisoner's counsel admits that John A. Eliason came to his death from the effect of a ball shot out of a pistol held in the hand of Ebenezer W. Frazier, the prisoner at the bar, and you are relieved, therefore, from the consideration and determination of the fact of killing, and if the case rested here but little further investigation or consideration would be necessary, for it is a general and well settled principle of law, that every homicide is presumed to be malicious and amounts to murder, until the contrary appears from circumstances of alleviation, excuse or justification, and it is incumbent on the accused to make out and establish to the satisfaction of the jury such circumstances of alleviation, excuse or justification, when they are relied upon as matters of defense.

But whilst the counsel for the prisoner admits that the deceased, John A. Eliason, came to his death by the hand of the prisoner at the bar, and in the manner described by the indictment, he insists that the act was done under great provocation and without malice either express or implied by law, and under such circumstances of alleviation as in law will reduce the crime from the higher grades,

that is, from murder of either degree, to that of manslaughter. When such defense is set up and relied upon by the prisoner, it is incumbent on him to establish to the satisfaction of the jury the facts and circumstances relied upon for that purpose, otherwise the offense will be murder.

The circumstances relied upon by the prisoner as matters of defense, to reduce the alleged crime of murder to manslaughter, are that, on the evening before and on the day of the occurrence, the prisoner and deceased had been drinking together, that the prisoner was at the time of the fatal tragedy in a state of intoxication, and that a difficulty arose between him and the deceased in the sitting room of Eliason's house immediately before the fatal shot was fired, and that the prisoner's reason was so far dethroned and swept away by passion and anger, as to make the consequences of his acts less criminal, and to reduce the crime from murder of either degree to that of manslaughter. Whether the prisoner has established this defense is a matter exclusively for your consideration. But it is to be observed that no provocation, however great, will reduce the crime of murder to that of manslaughter, if there be sufficient time for passion to subside and reason to interpose, and afterwards the slayer commits the homicide with a deliberate mind and fixed purpose, because the killing in such case would be with express malice, and the crime, murder of the first degree.

The premeditation, or intent to kill need not have existed for any particular length of time, for if the jury believed from the evidence, that there was a design or fixed purpose and determination to kill distinctly formed in the mind of the prisoner at the bar at any time before, or even at the moment when he fired the pistol, it was a deliberate and premeditated killing with express malice, and therefore murder of the first degree. If however the shooting of the deceased by the prisoner was not with a sedate and deliberate mind and formed design, so as to amount to express malice and murder of the first degree,

but if you have any evidence or facts proved on either side to satisfy you that it was suddenly done by the prisoner in the heat of blood or gust of passion, without any or without a considerable provocation, it would constitute what is in law denominated implied malice, and in such case it would amount to murder of the second degree. And if it has been shown to you that there was a personal conflict or combat between the parties in the room spoken of immediately before the deceased left it, and on his leaving it the prisoner pursued him and shot him, the offense would be murder of the second degree, unless the provocation was great and the parties were on equal terms of defense; and if the killing was done suddenly on provocation, but after sufficient time had elapsed for the blood to cool and for passion to subside and reason to interpose, it would be murder of the second degree. But if sufficient cooling time had not intervened, and the act was committed, that is, the deceased was shot by the prisoner in a fight upon provocation and in the heat of blood, and in a transport of passion, the offense would be only manslaughter, the indulgence of the law ascribing such acts to the infirmities of human nature, and on the supposition that by the sudden and violent exasperation of the affray a temporary suspension of reason was produced, and the transport of passion excludes the presumption of malice.

There are no precise limits of time within which the blood may be supposed to cool, passion to subside, and reason to interpose, but every case depends upon its own circumstances, and the cooling time would be what was reasonable under the circumstances of the case.

I have endeavored to describe to you the crime of murder of the first and second degrees, and also that of manslaughter, and what constitutes the three several grades of crime, with such illustrations as will perhaps enable you to apply the evidence and determine which one of the crimes enumerated (if either) the prisoner is guilty of. It is competent for you to convict him under this indictment of murder of the first degree, or you may acquit him

as he stands indicted and convict him of murder of the second degree, or of manslaughter, as you may think the evidence requires. The order of your investigation, gentlemen, should be to satisfy yourselves from the evidence, whether the prisoner at the bar, shot and killed John A. Eliason with express malice aforethought, that is, with a sedate, deliberate mind and formed design, such design being generally evidenced by some external circumstances indicating the inward intention; these circumstances may be such as lying in wait, antecedent menaces, former grudges and concerted schemes to do the party slain some bodily harm; there is no other way to discover the secret intentions of the heart. You cannot look into its recesses to ascertain what is there. Necessity therefore requires a resort to circumstances for the indication of the intentions which lie concealed in the heart and mind. If upon a full and careful review and consideration of the evidence, and all the surrounding circumstances of the case, you should be satisfied that the killing was done with express malice aforethought, the crime is murder in the first degree; but if you should not be satisfied that express malice existed in the mind and heart of the prisoner at the time he committed the fatal act, you cannot convict him of murder of the first degree, and you will then turn your attention to the lower grade of murder, that is murder of the second degree, which under our statute is when the crime is committed otherwise than is described in the first section of the Act of Assembly defining the crime of murder. The crime of murder of the second degree may be committed without the existence of express malice, as when one person kills another suddenly without any, or without a considerable provocation, the law implies malice, and in the absence of circumstances of alleviation, extenuation, excuse or justification, which must be shown to the satisfaction of the jury by the prisoner, or be developed by the evidence on the part of the prosecution, the crime is murder of the second degree.

It is proper, gentlemen, that I should say something to you in reference to the affidavits of the deceased which have been read in evidence as his dying declarations; such declarations are generally made without the sanction and obligation of an oath, and without an opportunity to those against whom they are used to cross examine the party making them; yet as a matter of necessity and in furtherance of public justice, they are admissible when they are brought within the principles of law, which govern that class of evidence. Crimes of the highest grade are often committed when no eye witness is present; hence the necessity of resorting to this species of evidence, but it should always be received with proper and due caution. Dying declarations of a deceased party are only admissible when made under a sense of impending dissolution, and some writers on the subject go so far as to say, that such declarations to be admissible must be made under a sense of impending and almost immediate dissolution; others have somewhat relaxed the rule, and are not quite so rigid in their construction of it. We think the proper and most sensible construction is, that there must exist in the mind of the party making such declarations at the time they are made, a firm conviction of impending dissolution, if not immediate, at no distant day, and that there should not be a lingering hope of ever recovering.

Whether in this case the declarations contained in the affidavits of the deceased, which have been read to you, were brought within this rule was a question for the Court, as like questions are in all other cases, and upon hearing the evidence on the part of the prosecution we permitted them to go in evidence. From the evidence we first had and on which we permitted the affidavits of the deceased to be read, it did not appear that the deceased, John A. Eliason, said much about his condition, as to fears of death or of hopes of recovery; it did appear however that after he had been taken to his room and was being undressed, he said it was all of no use, he feared he had

fixed him. He also said some time after dinner, that the keys of his safe should be taken care of, that its contents were or might be valuable to his children. And subsequently on one or two occasions, he said he should not live. But after hearing other evidence in reference to this matter on the part of the prisoner, we now deem it our duty to say to you that the force and weight of these declarations contained in the affidavits are very much weakened and impaired. Mr. Lawrence R. Davis, a witness examined on the part of the prisoner, after the affidavits had been read in evidence, stated that on Thursday night previous to the death of Eliason on Friday, he sat up with him, that one of his brothers asked him that night two or three times if Eben W. Frazier shot him, to which Eliason replied he did, that after the brother of the deceased had left the room, Eliason asked why his brother asked him that question, remarking that he must think I am going to die, saying "I hope not." The remark tends to some extent to show that Eliason was not entirely without hope of recovery, and therefore we say that the weight of the declarations contained in these affidavits is considerably weakened. Yet we are not disposed to take this portion of the evidence entirely from you, but leave it with you to be weighed and considered by you with caution, and accredited so far as you may in your judgment believe it to be entitled under all the surrounding circumstances.

It is proper that I should further say to you in reference to these affidavits, containing statements offered as the dying declarations of Eliason, that they are before you as though they were not sworn to, and that the fact of their having been sworn to by him does not give them an additional force or weight whatever, the oath administered to him by the Justice of the Peace being extra-judicial and unauthorized by law.

You will now take the case, gentlemen, and retire to your chamber and there give it that careful investigation

and consideration which its importance demands, and render such verdict as will have the approval of your own consciences under the responsible duties and solemn obligation resting upon you for the faithful discharge of which you will be answerable to God at the great day.

The jury retired to their room at 8 o'clock in the evening and returned into Court at 6 o'clock the next morning with a verdict of "guilty of murder of the second degree."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE v. GEORGE CRUTCH.

A prisoner indicted for larceny had been arraigned and had pleaded not guilty, and a jury had been duly empaneled and sworn to try the case, when it was discovered that the indictment contained no allegation as to the value of the goods stolen. *Held* that the Attorney General might at that stage of the trial enter a *nolle prosequi*, and indict him a second time for the same offense, because in contemplation of law the prisoner had not been put in jeopardy on the first indictment.

Court of General Sessions, &c., New Castle County, November Term, 1865. The prisoner, George Crutch, had been before indicted at this term for the same offense, the stealing of a half-barrel of mackerel, and on arraignment had pleaded not guilty, and after a jury had been duly empaneled and sworn to try the case, but before any witness had been called in it to the stand, the Attorney General had discovered that the indictment was defective, inasmuch as it omitted to allege the value of the property stolen, and with the permission of the Court, but

without the consent of the prisoner who had no counsel, entered a *nolle prosequi* with a view to send up the present corrected indictment for the offense. The Court, however, took occasion to admonish him before the *nolle prosequi* was entered that it must be done subject to all legal exceptions as to the consequences and the effect it might have at that stage of the trial on another indictment for the offense.

Gray, for the prisoner, objected that he could not under such circumstances be indicted a second time for the same offense.

Higgins, Deputy Attorney General. A *nolle prosequi* may be entered at any time before judgment, and another indictment for the offense be sent up. 1 *Whart. Am. Cr. Law* 513. 20 *Pick.* 356. 7 *Pick.* 179. The former indictment was so radically defective and insufficient for the want of any allegation as to the value of the goods alleged to be stolen, that no judgment or sentence could have been pronounced upon it by the Court, even after a conviction; and after a verdict of acquittal which the Court would have ordered at any stage of the trial as soon as that error had been discovered, it would be no defense under the plea of *autrefois acquit* in this trial, and when such is the case a *nolle prosequi* may be entered at any stage of the trial of it, for in contemplation of law the prisoner never was in jeopardy by reason of it. *Vaux' Case* 4 *Rep.* 44, 47. 2 *Sumn.* 42. *Arch. Cr. Pl.* 82. 2 *Hawk.* 521. 1 *Ch. Cr. Law*, 459. 1 *Russ. on Crimes*, 836.

Gray, for the prisoner. The same fundamental provision of the constitution which guarantees to the accused a trial by indictment or presentment of a grand jury in such a case as this, also guarantees that he shall not be for the same offense twice put in jeopardy of life or limb. *Cons. Art. 1, Sec. 8.* And the question which rises in this case is, when did that jeopardy begin on the first indictment

for the same offense? And the answer to it is, it began the moment the jury was sworn on it to well and truly try the traverse joined and a true verdict give according to the evidence, for it was from that moment charged with the deliverance of the accused on the issue joined in the case. *Co. Lit.* 227 b. 2 *Ld. Crim. Ca.* 357. 6 S. & R. 586. After the prisoner had been formally arraigned at the bar of the Court for the crime, and had pleaded not guilty to the indictment, and the jury had thereupon been duly empaneled and sworn to try the issue joined in the case, and were so charged with the deliverance of the prisoner upon that issue, he was entitled to a verdict of acquittal on that issue and that indictment, for the Attorney General had no authority or discretion at that stage of the prosecution to abandon the trial, or to discontinue it by entering a *nolle prosequi*; but having done so at his own instance, and against the admonition of the Court, subject to all exceptions as to the legal effect and consequences of such an entry, it was in law equivalent to a verdict of acquittal, and must be so considered by the Court. *United States v. Shoemaker*, 2 *McLean's C. C. Rep.* 114. After the jury is empaneled a *nolle prosequi* cannot be entered without the consent of the prisoner. 20 *Pick.* 356. This was distinguishable from *Vaux's Case* and the others cited on the other side in which it had been held that a second trial might be had after motion and arrest of judgment, and in cases where the indictment was so fatally defective in substance that no conviction could have been sustained, and no judgment entered upon it, and in which it had been held for such reasons that in law the prisoner never had been in jeopardy. In each of thoses cases, however, it would be observed that it was at the instance of the prisoner, of course, that the judgment had been arrested, or the conviction and sentence had been avoided, and not at the instance of the Attorney General or the prosecution. Besides, the prisoner in this case was then wholly without counsel, and *non constat* had the first trial

proceeded that the defect in the indictment would ever have been made known to him, or that any exception would have been taken at any time on his behalf to the invalidity to it. He would further observe that by another provision of the constitution that the prisoner was not only exempt from a second indictment for the same offense, but to a speedy trial on the first one in the case, and it would be contrary both to the letter and the spirit of that provision to hold that the Attorney General has any authority or discretion thus to protract and delay the ultimate trial and final disposition of a case, and to supersede it by another to be begun *de novo* for the same offense, particularly after the prisoner has got ready and gone to trial, and the jury has been empaneled and sworn in the case.

The Court held that in contemplation of law the defendant had not been put in jeopardy on the first indictment within the true meaning and intendment of the clause in the constitution relied on by the counsel for the prisoner, and overruled the objection to the second indictment.

COURT OF OYER AND TERMINER.

THE STATE v. WILLIAM A. MANLUFF.

Where there are several distinct, and independent felonies charged in an indictment, the Court will require the Attorney General to elect on which of them he will contend and rely for a conviction after all the testimony in the case has been heard on the trial of it; but not when all the counts in the indictment are for the same alleged felony, or on an indictment for burglarly in which the same breaking and entry of the dwelling house is alleged in all the counts with intent to commit different and distinct felonies specified and alleged in them. The crime of burglarly is the breaking and entering of the dwelling house of another in the night time with intent to commit some felony in it, whether such felonious intent be executed or not. Both breaking and entering are necessary to constitute the offense, and it must be in the night time, when there is not sufficient daylight or twilight begun or left to discern the countenance of a person. But this does not extend to moonlight. A very slight breaking is sufficient, such as forcing open a door, picking a lock, pulling back a bolt, breaking a window, taking out a pane of glass, lifting up the latch of a door, or the like; and even, the pulling down or raising up of the sash of a window, although it has no fastenings and is only kept in its place by its own weight, or its pulley weight, and if an outer door being open the burglar enters through it and unlocks or unlatches a chamber door within the house, or if to escape he breaks his way out of the house, it is a sufficient breaking in contemplation of law to amount to a burglarious breaking into the house.

The jury must be fully satisfied from the evidence that the prisoner was the man that broke and entered the dwelling house as charged in the indictment, but this may be proved by either direct or circumstantial evidence.

The jury must also be satisfied from the evidence that the prisoner broke and entered the dwelling house alleged with intent to commit in it some one of the felonies alleged in the several counts of the indictment, and all of which allege the same breaking and entering into it by him with the different felonious intents respectively alleged in them. And the intent with which he broke and entered it must be proved as any other fact in the case must be, by direct or circumstantial evidence indicating the intention to the satisfaction of the jury.

In general the intent may be presumed from what the accused actually did in the house after breaking and entering it; if he committed a felony, it may be fairly presumed that he broke and entered it for that purpose. But a person who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend to commit that particular offense.

If the prisoner when he cut the girl Lizzie Griffith on the neck and temple or face, intended to kill her, it may fairly be presumed in the absence of proof to the contrary that he broke and entered the house for the purpose of killing her.

In doubtful cases, as where there is great conflict of testimony on material points, or where the evidence for and against the accused is pretty nearly balanced, previous good character is entitled to due weight, and should incline the scales in favor of the prisoner; but where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to little, if any weight or consideration. If, however, after thoroughly examining the evidence and maturely considering it, the jury should entertain any reasonable doubt of the guilt of the prisoner, such as honest and conscientious men acting under the solemn obligation of their oaths, and in full view of all the testimony feel themselves constrained to entertain, he is entitled to the benefit of such doubt, and their verdict should be in his favor.

New Castle County, May Term, 1866. At a Court of Oyer and Terminer held at this term, William A. Manluff, negro, was indicted for the crime of burglariously breaking and entering in the night time the dwelling house of Mrs. Hannah F. Jones, with intent to commit rape and murder. The indictment contained several counts alleging the burglarly to have been committed with the intent to murder one Lizzie Griffith, also one Charles Chance, also some person unknown to the grand jury, and also

with the intent to ravish the said Lizzie Griffith. The dwelling house of Mrs. Jones was in the city of Wilmington and was broke and entered by the prisoner between the hours of three and four o'clock A. M. on the twenty-ninth day of March preceding, by ascending a trellis at the rear of it to a window in the second story of the back building through which he effected his entrance into it, and by a passage leading from it to the bed room in which the woman named Lizzie Griffith, an irish servant girl, was then sleeping. On retiring to bed about eleven o'clock that night she closed her bed room door, but did not lock it, and was awakened about half-past three o'clock by the lighting of a match in her room, and saw by the light of it a colored man standing in the room. She was much frightened, but exclaimed "who is there and what brought you here!" The match was quickly extinguished by him, or went out. He made no reply to her inquiry, but came up to the side of her bed, and then said in a low voice "hush! hush! make no alarm!" and laying something cold like steel or metal on the side of her face, asked her if she could see his pistol, said he had a pistol and if she made any alarm, he would fire the contents of it into her body. She replied she would not, if he would leave the room. He then asked her why she had made an alarm, to which she answered that she could not help it. After the match went out it was so dark in the room she could not see whether it was a pistol or a knife he had in his hand. She then asked him several times to leave the room, to which he at length replied that he did not know the way out. She then told him that there was a candle in the room and to light it, which he did, and placed it on the bureau, and then came up to the side of her bed again, and enquired if a widow lady did not live there, to which she replied yes, and then, if there was any man in the house, to which she also replied yes, and then where he slept, she answered in the small building in the yard detached from the main building. He then said that he was the man he came to kill, and not her, that he did not

come after her, but to drive a bullet through that man's head. She asked him what that poor man had ever done to him that he should want to kill him. He said that it was none of her business. He had given him sass. He then asked if they had any colored men in the house, and she said no. And then, if she would know him were she to see him again, and she said "no, she could not tell one colored man from another." He then asked her, if she was afraid of him. She said no. He then said, "I didn't come after you, but that man, to leave him a dead man." He then laid his hand on her bed, which she pushed off, telling him she did not want his hand on her bed. He then asked her to kiss him, which she refused to do, and said she would scream and wake the house. He told her to scream, for he wanted to know how loud she could scream. He next asked her name, and where she was from, and how long she had been in the country. Before that he had asked her if she was prepared to die, and told her that if ever she made any complaint against him, or any stir about the matter, he would meet her again for it. He afterwards said to her she was a fine girl, when she told him she did not want him to tell her so, whether she was or not, and again ordered him to leave the room, or she would give the alarm instantly, to which he replied that he did not know the way out, when she told him he could take the candle; he then wanted her to light him out, but she said to him she would not get out of bed on any account. He next asked how he could get out, she told him to go out of the door, and where he could find the stairs; she was then sitting up in bed, and just as she took her eyes off him to look at the door, he struck her with something he had in his hand, but she could never see what it was, upon which she cried out murder, and on the second blow from him she fell back on her pillow and he ran out of the room. She soon afterwards rose from her bed and made her way in great fear and trepidation to the room of Mrs. Jones in the same story of the main building, with a great deal of blood on her face, neck and

the front of her clothing to her feet, and with her wounds still freely bleeding, and gave the alarm that a negro man had just left her room after insulting and cutting her in her bed, and that he was still in the house and in pursuit of her. Two physicians were immediately called in who described them as two incised wounds, one on the left temple and the other on the right side of the neck, clean cuts apparently made with a sharp knife or razor, but not deep, or penetrating much more than through the skin and the tissues below its surface, and which were soon healed. From her account the Mayor of the city prepared a description of the offender and advertised a reward for his apprehension, and in the course of a few days two colored men were in succession arrested by the police for the offense, and were brought before her for identification, but without hesitation she declared neither of them to be the man. On the arrest, however, a few days later, of the prisoner and his production before her, she as unhesitatingly identified him and pronounced him to be the offender, and which identification she now confirmed at the bar of the Court.

The prisoner proved that his character for peace and order had always been good, and that he had been out that night with a serenading party until one o'clock, when he returned to his home and went to bed.

David Paul Brown, for the prisoner. There were no less than ten counts in the indictment, and before the State proceeded to the jury he would ask the Court to require the Attorney General to elect and state on which one or more of them he would contend for a conviction in the case. *Ros. Cr. Ev.* 231, 232 and the cases there cited.

The Court, without hearing the Attorney General, declined to do so, and remarked that it was an application addressed to their discretion; and where there are several distinct and independent felonies charged in the

same indictment, the Court will require the Attorney General to elect on which of them he will rely for a conviction after all the testimony in the case has been heard on the trial of it; but such is not the case in this instance, for all the counts in this indictment are for the same alleged felony, the burglary alleged in each of them, and when such is the case it is now well settled both in England and in this country, and in this State also, that the Attorney General will not be required to make such election.

The case was fully and ably argued on the evidence before the jury by Higgins, Deputy, and Moore, Attorney General for the State, and by Mr. Brown for the prisoner.

The Court, Gilpin, C. J., charged the jury. Burglary may be defined to mean in law, the breaking and entering the dwelling house of another in the night time, with intent to commit some felony in the same, whether such felonious intent be executed or not. Murder, rape, arson, assaults with intent to kill, larceny, and many other offenses, known to our laws, are felonies; but it is not necessary for the purposes of this case, that I should particularly enumerate them.

There are several questions material to be considered by the jury. First—The breaking and entering the dwelling house of Mrs. Jones in the night time. Both breaking and entering are necessary to constitute the offense, and it must be in the night time; that is, it must be at a time, when there is not sufficient daylight or twilight begun or left, to discern the countenance of a person. But this does not extend to moon light.

Very slight breaking will be sufficient, as by forcing open a door, picking a lock, pulling back a bolt, breaking a window, taking out a pane of glass, lifting up the latch of a door, or the like; and, even the pulling down, or raising up, the sash of a window, amounts to a sufficient breaking, although the window has no fastenings, and is

only kept in its place by its own weight, or by reason of the pulley weights. And if, the outer door being open, the burglar enters through it and unlocks or unlatches a chamber door within the house, or if to escape he break his way out of the house, it is a sufficient breaking, in contemplation of law, to amount to a burglarious breaking into the house.

The question then, first to be considered by you, is, did the prisoner break and enter the dwelling house of Mrs. Jones in the night time? And here, it is proper to observe, that this question involves the question of the prisoner's identity. Because, before the jury can be justified in returning a verdict against him, they must be fully satisfied from the evidence, that he is the very man that broke and entered. It is seldom that the identity can be proved by direct testimony, and therefore, it is generally necessary to resort to circumstantial evidence; but in this case, the proof is both direct and circumstantial. Direct as regards the testimony of Miss Griffith, circumstantial as respects the foot prints and the clothing with the pocket book and its contents.

Lizzie Griffith swears positively to his identity. She described him accurately shortly after the occurrence, and before she had seen him after it, his color, his features, his size, his clothing, so accurately indeed, that the officer was led to arrest him from her description. She identifies his clothes and certain articles, found in his clothes, as her property; and which she swears, were left by her in the pocket of her dress, when she went to bed on the night of the alleged burglary. Moreover, the foot prints in the soft ground, near the trellis, seem to corroborate her. Is she mistaken in his identity, or does she knowingly swear falsely?

On the other hand you have the testimony of Campbell, the Howards, Wilson and his father, mother and brother, as to his whereabouts on that night.

Joshua Campbell. Saw the prisoner go out of the side gate and heard him at his father's door trying to get in, at a little after 1 o'clock—10 minutes past 1.

Geo. W. Howard. Left prisoner at 6th and French streets at 12 o'clock.

Francis Howard. Parted company with the prisoner at 11th and Market streets at 1 o'clock.

Isaac Wilson. Parted with him at 9th and Orange streets at a quarter to 1 o'clock.

John G. Manluff. I and William came home at 10 minutes to 1 o'clock.

Hester Ann Manluff. Between 10 minutes before and 10 minutes after 1 o'clock, and

Jno. G. Manluff Jr. 10 minutes past 1 o'clock.

If you shall be satisfied from the evidence that the prisoner raised the sash of the window over the trellis, and thus entered the dwelling-house of Mrs. Jones; or if, the sash being up, he entered through the window, and afterward unlatched the door of the chamber in which Lizzie Griffith slept; or if to escape he broke his way out of the house, then, we say to you that the breaking and entering, required by the law to constitute burglary, was complete.

If you shall be satisfied from the evidence that the prisoner broke and entered, then the next question to be considered, will be the intent with which he so broke and entered? Did he break and enter, with intent to kill and murder Lizzie Griffith, or with intent to have carnal knowledge of her against her will and consent? Or did he break and enter with intent to kill and murder a person of the name of Charles Chance, or with intent to kill and murder some other person whose name is unknown to you? If he broke and entered for the purpose or with the intent of killing Chance or any other person, whether they were in the house at the time or not, the offense is complete.

The intent with which the deed was done, is a fact, to be proved, as any other fact in the case, either directly and positively, or circumstantially and inferentially, by the other facts established by the evidence. The intent of the accused is rarely declared by him in express words; you cannot look directly in his heart, and there read its secret purposes. You have no such power, and therefore, you are compelled to look to external circumstances, which have some relation to the fact charged, as indicating the internal purpose and intent of the heart. Circumstantial evidence, may be, and often is, as conclusive as direct testimony. The mode and manner of the breaking and entry, the time of night, his conduct when in the room, his manner there, his conversation and threats, the nature of the weapon, dangerous or deadly, the nature of the wounds inflicted, these, and all other circumstances proved in the case are proper matters for your consideration, in determining the question of intent, because, the crime consists in breaking and entering for the purpose and with the intention of committing the felony, by killing the person supposed to be in the house, and whom he sought there.

As I have already stated to you, that the breaking and entering must be for a felonious purpose; the intent to commit the felony is an essential ingredient in the offense of burglary; without such intent it would be merely a trespass. But it is a well settled general rule of law, that a person who commits one sort of felony in attempting to commit another, cannot excuse himself, on the ground that he did not intend the commission of that particular offense.

In general, the intent may be presumed from what the accused actually does in the house after breaking and entering it; if he commits a felony, it may fairly be presumed that he broke and entered it for that purpose; and in this case, if the prisoner, when he cut the girl Lizzie Griffith on the neck and temple or face, intended to kill her, it may fairly be presumed, in the absence of proof to the

contrary, that he broke and entered the house for the purpose of killing her.

Evidence of the prisoner's good character is always admissible. In doubtful cases, as where there is great conflict of testimony on material and essential points, or where the evidence, for and against the accused, is pretty nearly balanced, former good character, if proved, is entitled to due weight, and should incline the scales in favor of the prisoner. But where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character however excellent, is entitled to very little, if any, consideration or weight.

Gentlemen, the question which you are called upon to decide by your verdict, is, whether William A. Manluff, the prisoner at the bar, is guilty in manner and form as he stands indicted, or not guilty. This question you are to decide according to the evidence. If you are satisfied from the evidence that he is guilty, it is your duty to say so by your verdict. If after thoroughly examining the evidence, and maturely considering it, you entertain any reasonable doubt of his guilt, and by a reasonable doubt, I mean such a doubt as honest conscientious men, acting under the solemn obligation of their oaths, in full view of all the testimony, feel themselves constrained to entertain, the prisoner is entitled to the benefit of such doubt, and your verdict should be in his favor.

Verdict—"Guilty."

THE STATE v. JOHN GREEN.

In a trial for murder neither the Court or the jury are to be governed in deciding the case by anything contained in the statutes of other States, but solely by the statute of our own State. What was murder at common law is murder under our statute, and which merely divides it into two degrees, there being no such division of it at common law.

Malice aforethought is the essential ingredient and criterion of murder at common law, and is of two descriptions, express malice

aforethought and malice aforethought implied by law; but in either case it was murder and punishable with death at common law, while a division is made in it in that respect by our statute; it being made by it punishable with death only when committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; and with fine, pillory, whipping and imprisonment for life, when committed with malice aforethought implied by law. The former is denominated murder of the first, and the latter murder of the second, degree by the statute. Malice in general and express malice aforethought, and malice aforethought implied by law, defined and distinguished.

In a case of mutual combat there is mutual provocation, and if in the heat of blood occasioned by it, one party kills the other without premeditation, it is manslaughter. But it must appear that it was done in the transport of passion produced by it, and before he has had time to cool, or reason to regain the control of his passion. All the circumstances of the case must show that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but was solely imputable to human infirmity; and this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm.

Sussex County, October Term, 1866. At a Court of Oyer and Terminer, held at this term, John Green was indicted and tried for the murder of Solomon Potter. Both the prisoner and the deceased were colored boys about fifteen or sixteen years of age. The evidence was that in the month of August preceding, and a few weeks prior to the killing, the prisoner had demanded of the deceased a small sum of money he owed him, and when told by the deceased that he could not pay him because he had not the money, he became angry and swore and cursed him a good deal, and then told him if he did not pay it he would be sorry for it. That two weeks before the killing he exchanged an old pistol without any lock which he had long owned for another without any trigger and gave a dollar in the exchange for it, and which he loaded with powder and an iron slug made of a rivet or piece of wrought nail on the day preceding the commis-

sion of the act, and had it so loaded in his pocket on the night of that day when he rode on horse-back several miles from his home into Bridgeville where the deceased resided, and where he then enquired for him, but without meeting with him that night. The next morning on riding in a similar manner towards the town and when near it, he rode up to the deceased whom he found on the road side playfully boxing with another boy, and at once bade him to let that boy alone, and on his reply that he would not, he got off his horse, went up to him and took him by the arms, when the deceased did the same by him, but he soon bade the latter to let go of him, and after repeating it, told him if he did not let go of him he would shoot him, to which the deceased replied that he could not shoot anybody, he then said to him if he would let go of him he would show him, and soon the deceased let go of him when he put his right hand in his pocket, drew a pistol from it and leveling it at the deceased, who had now stepped backwards a step or two from him, and drawing the hammer of it back with his thumb, he let it fly forward when the pistol went off and shot the deceased who was then standing face to face in front of him and not more than a yard from him. The slug entered the abdomen of the deceased a short distance below the breast bone, and penetrating to a depth of over four and a half inches, resulted in his death soon afterwards. As soon as the prisoner discovered that he had shot him, he remounted his horse and rode off very rapidly, and endeavored to avoid arrest by concealing himself, and when arrested made several false and contradictory statements in regard to the circumstance of their meeting and the encounter between them.

Moore, Attorney General, contended that the evidence showed that the act was committed with express malice aforethought, and that the killing constituted murder of the first degree under the statute, for which the prisoner was indicted, because it clearly proved on his part a former

grudge against the deceased, and a deliberate mind and formed design by the means he adopted to procure the pistol and to prepare the iron slug with which he loaded it the day before, to shoot the deceased as soon as he could find him, and which he evidently hoped and expected to do during the evening of that day, and whilst in Bridgeville, and which he visited for that purpose. There was no fight between them to heat his blood or inflame his passion; and if there was, it was one of his own seeking and was begun by him without any provocation from the deceased; and even, the cool and deliberate drawing of the pistol from his pocket and leveling and aiming it at the deceased as he stood directly before him, and drawing the hammer back with his thumb and so firing it off at him, was preceded by an express threat equally as cool and deliberate to shoot him; all of which exhibited and proved that the act was committed with express malice aforethought as fully as it was possible for direct evidence to prove and establish it. He had since, it was true, alleged and pretended that the firing of the pistol and the shooting of the deceased was an accident, and unintentional on his part. That, however, was not only clearly contradicted by the evidence, but the speed with which he remounted his horse and fled from the scene of the murder, and his effort to escape arrest by concealing himself, were inconsistent with it, and in law negatived the pretension. 1 *Whart. Am. Cr. Law*, Sec. 714, Sec. 924, Sec. 971, note N. 1 *Archb. Cr. Pl.* 847.

Layton, for the prisoner. There was not sufficient evidence to prove that the act was committed with premeditation or express malice aforethought to constitute the killing murder of the first degree, and which it was absolutely incumbent on the State to prove to the satisfaction of the jury for two reasons; first, because the terms of the statute required it, and secondly, because it is so expressly alleged and charged in the indictment; and being a most material allegation, it must be proved as laid in it. Ex-

press malice aforethought was not to be inferred, and could not be implied, but must be affirmatively and positively proved as laid in the indictment, to establish the crime of murder of the first degree. Had the act been committed the night before in the town of Bridgeville, and the prisoner had sought to avail himself of the darkness of night to elude detection or escape arrest, the evidence of premeditation and design to shoot the deceased might have been more reasonably insisted on by the State as sufficient to prove it; but it was not until ten o'clock the next morning on a Sabbath day when riding towards the town, he casually and unexpectedly met with him and another boy playing together on the public road some distance out of the town, when a similar encounter commenced and was continued without any anger or passion on either side, between the prisoner and the deceased, until it unfortunately and speedily terminated as much by the banter of the one, as by the folly and indiscretion of the other, in the shooting of the latter with a very harmless pistol apparently that would not stand cocked and had no trigger to it; and the sad result of which it was much more reasonable to attribute to accident purely and to the mutual rashness and indiscretion of two boys only fifteen or sixteen years of age, than solely to the express malice, or to a deliberate design to commit such a wicked and malignant act on the part of the prisoner. He could hardly have expected, much less intended, to hit and shoot the deceased, notwithstanding he was so near him, when he lifted and drew back the hammer with the thumb of the same hand in which he held the pistol at the time it went off, by accidentally slipping from his thumb, as he alleges, and which was not at all improbable. But even if it were not accidental, the fact that the shooting of the deceased was willful and malicious would not be sufficient to prove express malice and murder of the first degree, unless it further showed a deliberate intention at the time to kill him, on the part of the prisoner. 1 *Russ. on Crimes*, 482, 483 in notes. 5

Yerg. 340. 3 *Yerg.* 383. *Hale* 451. 3 *Humph.* 439. But there was no threat made by him at any time to kill the deceased. It was at most only to shoot him, and the surprise immediately evinced by him when he found he had shot him, showed that he neither expected or intended even to shoot him, much less to kill him with such a pistol, and so charged as it was with a picee of an iron nail. Nor could his hasty flight from the scene in such a state of sudden surprise, not the attempt afterwards to conceal himself, in one so young and inexperienced in crime, help out the evidence in the case to rebut his allegation that it was accidental and unintentional, much less to convict him of murder with either express malice aforethought, or with malice implied by law, or of the crime of murder of either degree under the statute. For under the circumstances and the evidence detailed by the witnesses, it was manifestly the result of sudden surprise and fright, and not of conscious guilt. But the act was committed in a sudden collision and personal conflict between them, and, therefore, if even the killing was intentional, it could amount to nothing more than voluntary manslaughter.

Moore, Attorney General. Premeditation and deliberation may be the design of a moment in a case of homicide; and if the act be done with a deliberate intention to kill, though but the determination of the instant and executed as soon as conceived, it is evidence, and sufficient evidence in law, of murder with express malice aforethought, and of the first degree under the statute, unless there be palliating circumstances shown sufficient to mitigate and reduce the crime to murder with implied malice simply, or of manslaughter at common law.

The Court, Gilpin, C. J., charged the jury, that neither the Court or the jury were to be governed in deciding the case by anything contained in the statutes of other States, but solely by the statute of our own State. What was murder at the common law, was murder under our

statute which merely divides it into two degrees, there being no such division of it at common law. Malice aforethought was the essential ingredient and criterion of it at the common law, and was of two descriptions, express malice aforethought, and malice aforethought, implied by law; but in either case it was murder, and was punishable with death at common law, while a division was made in it in that respect by our statute, it being made by it punishable with death only when committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, and with fine, pillory, whipping and imprisonment for life when committed with malice aforethought implied by law; the former being denominated murder of the first degree, and the latter murder of the second degree by our statute. And as to the first it is sufficient in this case to say that the statute provides that every person who shall commit the crime of murder with express malice aforethought, shall be deemed guilty of murder of the first degree and shall suffer death.

Malice in the sense in which the law here employs that term, is not confined or limited to hatred, spite, revenge or malevolence towards the deceased in particular, but imports that general malignity and recklessness of the lives and personal safety of others, and is the dictate of a wicked, depraved and malignant heart devoid of a just sense of social duty, and fatally bent on mischief. And express malice aforethought at common law is generally defined to be where one person kills another with a sedate deliberate mind and formed design; such formed design being evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And though it is termed express malice aforethought, it does not require, as we see from this definition, to be proved that the accused ever expressed or uttered that formed design, but it may be proved by circumstantial evidence, such as lying in

wait, antecedent menaces, former grudges, and concerted schemes to do the party killed by him some bodily harm, because these facts or circumstances show the sedate deliberate formation of the design to commit the act before it was committed. And as evidence of express malice aforethought to be satisfactory to a jury on an indictment for murder at common law, that sedate deliberate mind and formed design might have been either to kill the deceased, or to do him some bodily harm or injury, which though it might not have been so intended by the accused when committed, did in fact, result in his death, as was ruled in an early case after mature consideration by all the Judges and Barons in England, in which a park-keeper who caught a boy stealing wood in the park with a rope around his body, one end of which the park-keeper tied to the tail of the horse he was riding on when he surprised him in the act, and the boy making no resistance, then struck him two blows on his back when the horse took fright and ran off dragging the boy behind him on the ground, and so injured him that he soon after died of the injuries; and on which evidence he was condemned and hung. *Halloway's Case. Cro. Car.* 131. And this definition of express malice aforethought at common law recognized and ruled repeatedly in later cases with only one qualification, and that is, that such deliberately formed design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, or any dangerous instrument likely to produce death, by privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like. So that it must now appear from the circumstances attending the act that such formed design was either to kill, or to do some great bodily harm to the deceased which caused his death. 3 *Greenl. Ev. Sec.* 145. Many of the States have also divided the crime of murder into two or more degrees, and have materially modified and varied this principle of the common law, some of them making the

deliberate intention to kill, the sole and necessary criterion of express malice aforethought and of murder of the first or greatest degree under them. But inasmuch as the common law definition of the crime of murder and of express implied malice aforethought, as constituting the essential element and characteristic of it, was the only rule or definition we ever had in this State up to the time when the crime was divided into two degrees under the Revised Statutes in 1852, and that division simply provides in the first place on this subject that "every person who shall commit the crime of murder with express malice aforethought," shall be deemed guilty of murder of the first degree under the statute, without any definition of it, or saying what shall constitute the evidence or the indications of such malice aforethought, and the test of the crime of murder of the first degree under the statute, we are necessarily remitted, of course, to the common law for the legal meaning and definition of those terms, and of the meaning of the statute which has thus adopted them without any explanation or qualification of them. As to the question how long a time it will require in contemplation of law for the formation of such a design, or what amount of sedate premeditation is necessary to constitute the commission of the act a case of murder with express malice aforethought, the only proper answer is that the question of time does not enter into it, for if it be calmly and deliberately formed, though in a moment, and as soon as formed executed, it would be evidence of express malice aforethought; and therefore on that point to illustrate the meaning of the rule in this case he would say that if the prisoner at the time he took the pistol from his pocket and pointed it at the deceased and discharged it, had deliberately formed a design in his mind to shoot him with it, having committed that act with a deadly weapon, which was naturally calculated under the circumstances proved and at the short distance the parties then stood from each other, to inflict a mortal wound upon the deceased, it was committed with express malice

aforethought, and was murder of the first degree under the statute. And upon this allegation, which it was necessary for the State to prove as a fact to the satisfaction of the jury beyond any reasonable doubt, that it was pointed and fired at the deceased with a deliberately formed design and intention at that moment on the part of the prisoner to shoot him with it, they would have to consider well the testimony of the only witness who was present at that time, and who testified that he and the deceased were playing and boxing with each other in the public road when the prisoner rode up on a horse and stopping at once bade the deceased to let him alone, to which he replied that he would not, when the prisoner dismounted, stepped up to the deceased and took hold of him by both of his arms, and that the deceased also then took hold of the prisoner in the same manner. That the prisoner soon tried to release himself from the hold of the deceased, and not succeeding in the effort, told him to let go of him, but the deceased did not, and soon the prisoner again told him to let go of him, and if he did not, he would shoot him, to which the deceased replied that he couldn't shoot any body, to which the prisoner rejoined that if he would let go of him, he would show him, and that the deceased then let go of him, when the prisoner put his hand in his pocket, drew from it the imperfect pistol proved and in evidence before them, and leveling it at the deceased who at that moment stepped backwards a step or two but not more than a yard from him, and still facing him, drew back the hammer of it with the thumb of the same hand in which he held the pistol, there being no trigger to it, when it quickly passed from his thumb, which fired and discharged it, and the deceased was shot and mortally wounded by it, as described by the physician who was instantly called to see him, and died of the wound soon afterwards.

It would be the duty of the jury to consider well this and all the rest of the testimony in the case, and to determine from it whether the prisoner in the manner

described and detailed by the witness, intentionally discharged and shot off the pistol at the deceased, and if so, whether it was so discharged by him with a sedate deliberate mind and formed design to shoot the prisoner with it. If after so considering the evidence, the jury should be satisfied beyond a reasonable doubt that such was the case, then it would be their duty to find that he committed the act with express malice aforethought, and is guilty of murder of the first degree under the statute; for if he so committed the act, having done it with such a deadly weapon as a loaded pistol, the law assumes that he contemplated and intended the ordinary and natural consequences of it to the deceased. And in considering and determining this question of fact as to whether the act was, or was not, committed with a deliberately formed design by the prisoner, it would be proper for the jury to take into consideration in connection with the testimony before particularly referred to, the evidence in regard to the alleged previous grudge of the prisoner against the deceased, also the alleged previous threat or menace made by him that if he did not pay him, he would be sorry for it, and also the evidence before them in regard to the procurement and the previous preparation and loading of the pistol by the prisoner. But, if the jury on the contrary should be satisfied from the evidence that the act was done accidentally and unintentionally by the prisoner, then it was excusable in law, and he should therefore be acquitted.

As our statute provides in the first section that every person who shall commit the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree, and shall suffer death, and in the second section that every person who shall commit the crime of murder otherwise than is set forth in the first section, shall be deemed guilty of murder of the second degree, and shall be otherwise punished as is set forth in the second section, that is to say

with fine, pillory, whipping and imprisonment for life; and as the object of the statute in dividing the crime of murder as it before existed in this State, and still exists at common law, was to make the penalty of it death only when committed with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, and to moderate and reduce the penalty of it to fine, pillory, whipping and imprisonment for life when committed otherwise than is specified in the first section, the terms otherwise committed must be understood to mean when committed with implied malice aforethought in the sense in which those terms were then used and understood at common law, or they will be wholly without meaning or signification, and there could be no crime of murder with implied malice, or of the second degree under the statute. According to the common law definition of it, malice is implied by law from any deliberate cruel act committed by one person against another, however sudden, thus where one person kills another suddenly without any, or without a considerable provocation, the law implies malice. The distinction between it and express malice, particularly, is when the act is committed suddenly without any provocation; but the importance of it practically was but comparatively slight at common law, as the penalty was the same, and was death whether it was committed with express or with implied malice. Our statute however, nice as it may be in some cases, has made it one of vital importance to the accused in all such cases, by making implied malice aforethought in contradistinction to express malice aforethought, the sole criterion of the crime of murder of the second degree under its provisions. To constitute the considerable provocation here referred to in the definition just stated, in order to rebut or negative the implication of malice aforethought in such a case of sudden killing, it must be as least sufficient in law to reduce the killing to the crime of manslaughter; and as the only facts or circumstances disclosed in this case which can have any bearing on that

point was the failure of the deceased to pay the prisoner a small sum of money which he owed him, and demanded of him by the prisoner a few weeks prior to the commission of the act, and the brief and apparently playful struggle between them immediately preceding the commission of it, and the evidence as to which he had already capitulated, he would read from a work of acknowledged authority the established doctrine of the common law in regard to the kind and degree of provocation which is required to extenuate and reduce the killing in such cases from the crime of murder at common law, and of either degree under the statute, to the crime of manslaughter. As the indulgence which is shown by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis* which while the frenzy lasts, renders a man deaf to the voice of reason, so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the act he would extenuate is committed. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. For there are many trivial, and some considerable, provocations which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice to which the other circumstances of the case may lead. No breach of a man's word or promise, no trespass, either to lands or goods, no affront by bare words or gestures, however false or malicious and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm. 1 *Russ. on Crimes* 513, 514. The distinguishing characteristic between the crime of murder and the crime of

manslaughter at common law being that while the former cannot be committed without malice aforethought, either express or implied, the latter cannot be committed with malice either express or implied.

This extenuation on the ground of provocation usually arises in cases of mutual combat or fighting between the parties in which a violent transport of anger and passion had suddenly impelled the one to inflict a fatal blow or wound upon the other, and before there was time for the passion to subside and reason to restrain the *furor brevis* which impelled it. And yet, even in such cases where there was not time for the passion to subside and reason to resume its sway, the combat or fight will not be a sufficient provocation to extenuate and reduce the killing to manslaughter, if the evidence be sufficient to satisfy the jury that the slayer had provided himself with a deadly weapon beforehand in anticipation of the fight, and not for the defense of his person against a felonious assault apprehended by him from the other party. 3 *Greenl. Ev. Sec.* 121. But according to the evidence in this case the collision between the prisoner and the deceased which immediately preceded the shooting, did not amount to a combat or fight, perhaps, at any time between them, no blows having been struck by either, but at most, in contemplation of law, to a mutual assault and battery only, consisting of their seizing each other by both their arms and a struggle of strength for a few moments between them in which it seems the deceased proved too strong for the prisoner, and from which he soon voluntarily released him after the prisoner had twice threatened to shoot him if he did not do so on his bidding, with the taunt that he couldn't shoot any body. And yet when the provocation consists of an assault merely of this kind, the law holds that it must appear that the provocation was considerable, and not slight only, in order to reduce the homicide to manslaughter, and that for this purpose the use of reproachful words however insulting or opprobrious, or of actions or gestures expressive of contempt or reproach, without an

assault, actual or menaced, on the person of the slayer, will not be sufficient, if a deadly weapon be used by him; but if the fatal stroke be given by the hand only, or with a small stick, or other instrument not likely to kill, a less provocation will be sufficient to reduce the offense to manslaughter: and, therefore, the killing has been held to be only manslaughter, though a deadly weapon was used, where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway, or other actual battery. 3 *Greenl. Ev. Sec.* 122. But notwithstanding under certain circumstances an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will as a matter of course reduce the crime to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offense, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder notwithstanding such provocation. *Ros. Cr. Ev.* 725. 1 *East. P. C.* 234. 1 *Russ. on Crimes*, 515.

It would therefore be the duty of the jury to consider and determine from all the facts and circumstances proved in the case, and upon the law as thus announced and defined to them, whether the prisoner willfully and intentionally shot the deceased with the pistol in question, and if so, whether the act was committed by him with express malice aforethought, as before defined and explained to them; and if such should be the conclusion of the jury on all the evidence, then it would be their duty to convict the prisoner in manner and form as he stands indicted, that is to say, of murder of the first degree. But should not the jury be so satisfied, and come to the conclusion that it was committed in a sudden transport of

passion produced by the mutual assault in which the parties had immediately before been engaged, and before it had subsided, if such a passion had been excited in the prisoner by it, and without previous malice or malevolence on the part of the prisoner against the deceased, and also that it was committed without a considerable provocation thereby given him by the deceased, such as would be sufficient according to the law laid down to them on that point, to extenuate the act and to reduce the killing to manslaughter, then in contemplation of law it was committed with implied malice, and their duty would be to convict him of the crime of murder of the second degree. But if, on the contrary, they should be satisfied from the evidence that the act was so committed by him in a sudden transport of passion produced as just before mentioned and without previous malice or malevolence as before stated, but with and upon such a considerable provocation thereby given him by the deceased as has also just before been stated, then the legal implication of malice would be rebutted, and it would be their duty to convict him of the crime of manslaughter. For under the indictment the prisoner may be convicted of either of these crimes. As the *factum* of the killing of the deceased by the prisoner has been proved and is not denied, it is presumed in law to have been done with malice aforethought, and it is therefore incumbent upon him to prove to the satisfaction of the jury that it was not done maliciously, unless it should so appear from the evidence offered against him. All the facts and circumstances proved in the case together with the weapon used, its imperfection, the manner in which it was loaded, the way in which he fired it, and the youthful age of the prisoner, with the questions of law involved in it, were all before the jury and upon which it would now be their solemn duty after a careful, complete and conscientious consideration of them, to decide and determine whether the act of shooting the deceased was willfully and intentionally committed by him, and if so, whether he was

guilty of the crime of murder of the first degree, or of murder of the second degree, or of manslaughter in committing it, and in thus killing the deceased, bearing in mind, however, that it will also be your duty at every stage of this progressive enquiry as to his guilt, from the first to the last, to give the prisoner the benefit of any reasonable and conscientious doubt which you may have as to his guilt, or the degree or grade of the crime, if he is guilty of either under the indictment, and which it was the province of the jury, and not of the Court, to determine.

Verdict—Guilty of murder of the first degree.

THE STATE v. JOHN TILL.

Murder of the first degree under the statute is when the homicide is committed with express malice aforethought as described and defined at common law, or in perpetrating or attempting to perpetrate any crime punishable with death.

Murder of the second degree under it is when the homicide is committed with implied malice aforethought as described and defined at common law.

Voluntary manslaughter under it is when the homicide is willful and unlawful, but is committed under such circumstances of provocation or alleviation as will suffice at common law, or under statutory provision, to rebut the implication of malice aforethought and reduce it below the grade of murder of the second degree.

Homicide *se defendo* or in self-defense, is excusable or justifiable in law, but to constitute and establish this defense in any case it must appear that the party killing was not only in imminent and manifest danger of losing his life, or of suffering enormous bodily harm, and was closely pressed by his assailant, but that he sought to avoid it, and retreated from the violence of the assault as far as he conveniently and safely could, and that the killing of the assailant was necessary after having done this, to protect his own life, or to save himself from such bodily harm.

Drunkenness or intoxication is no excuse in law for crime, unless it be such as to render the party unconscious of what he was doing at the time.

New Castle County, May Term, 1867. At a Court of

Oyer and Terminer held at this term, John Till, negro, was indicted and tried for the murder, in the first degree, of William H. Till on the 24th day of March, 1867. They were brothers, the deceased being older and much stouter than the prisoner, and were both employed at the time as hands on the farm of James Rogers, Esq., near New Castle. The prisoner had been sent that morning from the farm to the town, and the deceased on his leaving had supplied him with a small sum of money to buy some tobacco for him, but on reaching the town he was drawn to a fire which had just broken out in it, and after assisting to extinguish it returned to the farm later than he was expected, and when asked by the deceased if he had got his tobacco, said he had not, and on his then asking him for the money, he told him with a smile that he had spent it, at which the deceased took offense, and angrily exclaiming "do you take my money in that way and then laugh in my face?" struck him twice with his fist, once on the neck and once on the cheek, when the prisoner also flew into a passion and swore with an oath that he would get the gun for him, and as he turned and started towards the house which was near at hand, the deceased kicked him and defied him to do it, and said to him if he came out there again he would skin him. The prisoner proceeded with a quick step to the house and into the kitchen, and from the kitchen up stairs and soon re-appeared at the kitchen door with the gun in his right hand and without stopping to do it, took it in both hands, cocked it and looked at the cap of it as he walked hurriedly towards the deceased, who then started towards him with a long-handled weeding shovel in his hand with which he had been at work when the altercation began between them; the prisoner then raised the gun in both his hands to his shoulder, pointed it at the deceased and fired and shot him when they were about twelve or fifteen feet from each other. The deceased then rushed at the prisoner, caught him by the collar and again kicked him. The prisoner said nothing as he came towards him from

the kitchen door, but seemed to be very angry. The deceased, however, soon afterwards fell upon the ground, and died in a few hours of the wound inflicted which was with No. 8 bird shot covering a circumference of four or five inches in diameter on the upper portion of the right side of the chest, a number of which had penetrated it to the depth of three inches between the first and second ribs and lacerated the lungs very much. It was also proved that the prisoner had been drinking some that morning after the fire in the town had been extinguished, but was not drunk.

Higgins, Deputy Attorney General, contended that the evidence constituted it a case of murder of the first degree under the statute, as the intention to kill the deceased and the deliberation with which it was done as manifested by the facts and circumstances which accompanied it, clearly indicated, for the distinctive peculiarity attached by the statute to murder of the first degree is that it must necessarily be accompanied with a premeditated intention to take life. Wherever then in cases of deliberate homicide there is a specific intention to take life, the offense, if consummated is murder in the first degree; if there is not a specific intention to take life, it is murder in the second degree under the statute. To constitute murder of the first degree under the statute, the intent of the party killing must have been to take life, whereas, by the common law, if the mortal blow is malicious, and death ensues, the perpetrator is guilty of murder, whether such an intention does or does not appear to have existed in his mind. The first enquiry, therefore, of a jury under the statute after a felonious and malicious homicide is established, but not committed in perpetrating or in attempting to perpetrate either of the other high crimes specified in the act, is whether the mortal blow or wound was given with the intent to take life, or merely to do great bodily harm to the person killed. If the former is proved by the evidence, the crime is murder in the first degree; if such an

intent does not satisfactorily appear, the jury should return a verdict of murder in the second degree. 1 *Whart. Cr. Law, Sec. 1084*. It must be assumed from the facts proved and the deadly weapon used and aimed and pointed directly at the breast of the deceased within twelve feet of the muzzle of it, that the prisoner intended not only to shoot him, but to kill him. Besides it is an irresistible presumption both of reason and of law that the prisoner intended the natural and probable effect and consequences of such an act when he did it. A specific intent therefore, to take life could not be more clearly and conclusively indicated and established in any case. The time it took to procure the gun, the distance he went in search of it after his first collision with the deceased, the coolness with which he returned from the kitchen stairs down to the door with it, and with which he cocked it and looked at the cap of it as he walked out into the yard toward the deceased, and with which he raised it in both hands to his shoulder, pointed it at the breast of the deceased and fired and shot him with it at twelve feet only from the muzzle of it, showed such deliberation and premeditation in his preconceived purpose from the start to kill him with it, and such express malice as in law could only properly characterize the crime of murder of the first degree under the statute, and not even murder of the second degree under it, much less the crime of manslaughter. As to the latter grade of offense, if a verdict, as a last resort, in that form should be contended for on the other side, he would only say that where the killing is done with a deadly weapon, the provocation must be great to mitigate and reduce the offense to the grade of manslaughter, and no assault with the fist or foot, or both merely, can constitute an adequate provocation to so mitigate or alleviate it in any case when the killing is done with a deadly weapon. Besides, too long a time had elapsed according to the facts proved in this case, and too much coolness, premeditation and deliberation was exhibited by the prisoner in the selection and procurement of the deadly weap-

on with which it was done, between the time of the provocation received and the time of the mortal wound given, to reduce the crime to manslaughter, even if a much greater provocation had been given, and one which might otherwise have been sufficient for that purpose. 1 *Whart. Cr. Law*, Sec. 971. *Fost.* 290. 1 *Russ. on Crimes*, 482. As to the state of intoxication the prisoner was in before he left the town that morning the opinions of the witnesses varied considerably. One thought him pretty drunk and another very much intoxicated; another witness met him afterwards as he was driving out of town on his way back to the farm where he lived, and had some talk with him, and thought then that he had been drinking, but that he was not drunk, and another who rode out with him to the farm stated that he was drunk going out to the farm, but was not as drunk when he arrived there, as he was in town, for he staggered in the town. But the legal test and rule on this subject now is, that if the prisoner was not so drunk at the time as not to know what he was doing, and to be unable to form any intention to do it, then the state of his intoxication whatever it might have been at that time, could not excuse or mitigate in any degree the great crime which he had committed. 1 *Whart. Cr. Law*, Secs. 42, 43. 1 *Bish. on Cr. Pro. Secs.* 298, 382.

Booth, for the prisoner, contended that there was no evidence of a specific and deliberate or premeditated intention on the part of the prisoner to kill, or take the life of the deceased, without which the killing could not be considered murder with express malice aforethought at common law, and of the first degree under the statute. On the contrary, the facts proved clearly showed that it was suddenly committed in a violent transport of passion and fury under a gross provocation by way of an assault upon him by the deceased, at a time when the prisoner was certainly under the influence and excitement of intoxication which would negative even the implication of malice, and reduce it to nothing more than manslaughter

at furthest. *Ros. Cr. Ev.* 724, 726, 733. *Reg. v. Kirkham*, 34 *E. C. L. R.* 318. *Reg. v. Smith*, 34 *E. C. L. R.* 334. The state of intoxication he was still then in, according to all the proof on that point, together with the provocation which he had just received from the deceased, and the sudden heat of blood produced by it, and which had not yet had time to cool in his excited condition increased as it was by that intoxication, was sufficient in law to mitigate and reduce the homicide to the offense of manslaughter, at least. 1 *Whart. Cr. Law*, Secs. 41, 42, 43. 1 *Bish. on Cr. Pro.* 302. *Reg. v. Thomas*, 32 *E. C. L. R.* 750. *King v. Lynch*, 24 *E. C. L. R.* 342. 1 *Whart. Cr. Law*, Sec. 1026, (*Selfridge's Case*.) But the deceased not only rudely and violently assaulted the prisoner in the first instance and at the beginning of the brief but unfortunate affray between two brothers without any adequate provocation, but taunted and defied him to get the gun, and as soon as he produced it rushed at him with his long-handled shovel, a weapon scarcely less dangerous and deadly than a small bird-gun charged with a half-load of ordinary bird-shot; and which converted an unprovoked affray of his own making almost instantly into a mutual combat of his own seeking, with equally dangerous and deadly weapons on the part of both of the combatants; and which would justly constitute a case of killing in self-defense on the part of the prisoner. *Ros. Cr. Ev.* 765. For sad and horrible as the tragedy in the end proved to be, and as much as it was to be abhorred on the part of both the brothers, he would venture to say that the deceased, who was older and so much stouter than the prisoner, was in a moral point of view the most responsible for it.

Moore, Attorney General, replied.

The Court, Houston, J., charged the jury. The prisoner, John Till, is indicted for the killing of his brother, William H. Till, on the 24th day of March last in this hundred, with express malice aforethought, and accordingly

for murder of the first degree under the statute. But by the terms of the statute it is also provided that in every case in which murder is otherwise committed than with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death, it is murder of the second degree under it; and this imports in contradistinction to murder of the first degree as just defined in the words of the statute, when it is committed not with express malice aforethought, but with malice aforethought implied by law. Murder of the first degree is punishable under it with death, murder of the second degree with fine, pillory, whipping and imprisonment for life.

Prior to the enactment of the statute the only law we had in this State defining the crime of murder was the common law, and to that we must recur for the meaning and definition of express and implied malice aforethought, since the statute itself does not give any, and it must therefore be understood to derive them from the common law, and by implication, at least, to adopt them in the same sense in which they were employed and recognized at common law and the law of this State when the statute was enacted.

At common law, and by the law of this State at that time, however, the distinction between express malice aforethought, and malice aforethought implied by law in respect to the crime, had no effect in law to mitigate or change the grade of it, because it was murder nevertheless, and punishable with death, whether committed with express or with implied malice aforethought in the sense in which those terms are employed at common law respectively, although each has its appropriate meaning and signification at the common law. And therefore in accordance with it before the enactment of our present statute some fifteen years ago, we had but one degree of murder under the laws of this State, and that was punishable with death, whether committed with express or implied malice aforethought, as before stated. And at common law they

are thus defined in respect to murder, and to which crime they can alone apply in their proper legal signification. Murder is the killing of any person with malice prepense or aforethought, either express or implied by law. And malice prepense or aforethought constitutes the chief characteristic, the grand criterion by which murder is to be distinguished from all other species of homicide, as well as all other crimes; and it will therefore be necessary to enquire concerning the cases in which such malice has been held to exist. It should, however, be observed that when the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; a heart regardless of social duty, and deliberately bent on mischief. And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also in many other cases such killing as is accompanied with circumstances which show the heart to be desperately wicked, is adjudged to be of malice prepense, and consequently murder.

So much for malice prepense in general and the peculiar import of the term in the description of murder, and in the distinction of it from all other species of homicide and from all other crimes. But as we have before said, it may be either express or implied by law, and although the distinction between them at common law was not sufficient to induce any discrimination in the grade or degree of the crime or in the punishment due to it, whether committed with express or implied malice, our legislature has seen proper to make the common law distinction between them, slight as it is, the ground of distinction between murder of the first degree and murder of the second degree under the statute, except when it is committed in perpetrating or attempting to perpetrate

any crime punishable with death, which it also makes murder of the first degree. At common law express malice aforethought is when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the intention of the mind; such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. As the intention with which the act is done is in general only to be discovered from the facts and circumstances attending it, these are given as instances merely in which the facts and circumstances stated evidence the deliberate mind and formed design to commit the act or to do the party some bodily harm which results in his death. And from this it clearly appears as a further definition of the particular and peculiar meaning attached to the term malice aforethought in describing the crime of murder, that the malicious intention must be to do the party some bodily harm, for an intention to do him any other harm or injury however great or malicious, felonious or deliberate it may be, cannot involve in contemplation of law the malice aforethought which constitutes the grand criterion and chief characteristic of murder. For not, even the crime of arson, or the malicious burning of another's dwelling house, although a capital offense also, however deliberately and maliciously it may be done, involves the idea of such malice aforethought in contemplation of law. And it is because the security of human life is of the highest consideration in law. Malice aforethought is implied by the common law from any deliberate, cruel act committed by one person against another, however sudden, as where one person kills another suddenly without any, or without a considerable provocation, the law implies malice. And it is a general rule of the common law that all homicide is presumed to be malicious, and to be murder, until the contrary appears from circumstances of alleviation, excuse or justification; and that it is incumbent upon the prisoner when the killing is proved, to make out such circum-

stances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him.

From these definitions of express and implied malice aforethought at common law it will appear to the jury that while a sedate deliberate mind and formed design on the part of the accused to kill the party slain, or to do him some bodily harm, is essential to constitute express malice aforethought, and murder of the first degree under our statute, the other description of malice aforethought essential to constitute murder of the second degree under it, is implied by law from any deliberate cruel act committed by one person against another, however sudden; as where one person kills another without any, or without a considerable provocation, the law implies the malice aforethought which constitutes it murder of the second degree under the statute. When therefore the act is committed with the deliberate mind and formed design contemplated in the first definition, and death is produced by it, it is evidence of express malice aforethought, and is murder, as we have before said, of the first degree in this State; but if death is produced by any deliberate cruel act committed by one person against another, however suddenly done, without any, or without a considerable provocation, the law implies malice aforethought in such a case, and it is murder of the second degree in this State. Because here, as we have before remarked, the distinction between the first and the second degree of murder under our statute, depends entirely on the distinction between express malice and implied malice aforethought at common law in respect to murder, except when it is committed in perpetrating or attempting to perpetrate a crime punishable with death. And this view is sustained by the authority cited by the Deputy Attorney General, in this case, 1 *Whart. Cr. Law*, Sec. 1084, although by the statute of Pennsylvania, and the judicial interpretation given to it by the Courts of that State, the specific intention to kill is made the criterion of murder of the first degree under their statute.

But in order to reduce the killing from the crime of murder committed with express malice aforethought and of the first degree under our statute, or with that coolness and deliberation of mind and formed design which is discovered and evidenced by the circumstances attending it, to murder committed with implied malice aforethought and of the second degree under the statute, it must not only appear that the deliberate, cruel act against the person killed was committed suddenly, and without the coolness, deliberation and formed design before mentioned, but that it was also committed without any, or without a considerable provocation. Because if the act of killing appears to have been committed with such a considerable provocation as is recognized in law to rebut and negative even the implication of malice aforethought, it cannot constitute murder of the second degree under the statute, but it will be reduced to the crime of manslaughter under the statute. For under the facts and circumstances proved in this case, and as the killing of the deceased by the prisoner at the bar is not in dispute now before the Court and jury, it is sufficient here to say without any further reference to, or general explanation of, the law in relation to homicide, that the term provocation just mentioned can have no other application in this case than such as the counsel for the prisoner has contended should have the effect to reduce it to a killing in self-defense, or to the crime of manslaughter, at least, in contemplation of law. But the provocation referred to in the definition of implied malice aforethought has particular reference to such acts of provocation as are sufficient to reduce an unlawful killing of one person by another from the crime of murder of either degree under the statute, to the crime of manslaughter, the next highest offense in case of homicide.

And as in this species of homicide, malice aforethought which is the main ingredient and characteristic of murder is considered to be wanting, manslaughter is therefore defined to be the unlawful killing of another without malice aforethought, either express or implied; and as

the offense is supposed to have been committed without malice, so also it must have been without premeditation. But this cannot occur in any case of unlawful killing unless it appears from the evidence that it was committed under a considerable provocation, and such as is recognized in law as sufficient under the circumstances proved to rebut the implication of malice; and such provocations vary in their character, but are well defined in the law. So far however as this case is concerned it will not be necessary to refer particularly to more than one class of them, and which is of more frequent occurrence, perhaps, than any other in cases of manslaughter. And that is when the provocation consists of actual violence or an assault committed by the deceased on the person of the accused, and in a sudden transport of passion, or heat of blood produced by it, and before he has had time to cool, he kills the aggressor, either with means not likely to produce death, or with a deadly weapon at hand and suddenly seized or used without preparation or premeditation, it is imputed by the benignity of the law solely to human infirmity, which though criminal in the eyes of the law, is considered as incident to the frailty of the human constitution, and therefore to have been committed without malice, and to be manslaughter only. But no words however abusive, insulting or offensive, without an assault or actual violence committed or menaced to him, upon the person of the accused, or on some one standing in the relation of a wife, son, daughter or servant, can constitute such a provocation in contemplation of law. And as the indulgence which is shown by the law in such cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which while the frenzy lasts renders a man deaf to the voice of reason, so such a provocation must be felt and resented by him at the instant and before he has had time to cool, or for reflection; and all the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm to the deceased,

was not the result of a cool, deliberate judgment and previous malignity of heart, but was solely imputable to human infirmity. For there are many trivial, and some considerable provocations, which are not permitted, or deemed sufficient in law to extenuate an act of homicide, or rebut the conclusion of malice, and so reduce it to the crime of manslaughter. It is also a rule of law on this subject that in all cases of slight provocation, if it may be reasonably inferred from the weapon made use of, or from any other circumstance proved in the case, that the party intended to kill or do some great bodily harm, the law will imply malice, and such homicide will be murder of the second degree, at least, under our statute; and will be murder of the first degree, if the act is done with express malice, for the plea of provocation will avail in no case where there is evidence of express malice aforethought. And though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in law may amount to an assault, nor in all cases even by a blow, for violent acts of resentment bearing no proportion to the provocation or insult, are barbarous and proceed rather from brutal malignity than human frailty, and barbarity will often be evidence of malice. It is furthermore a rule of law that if a deadly weapon, or other instrument likely to produce death, be made use of, and death ensues, malice will be presumed, unless it appears that it was suddenly used without premeditation, in the heat of blood and the transport of passion produced by the provocation; and that in every case of homicide upon provocation, how great so ever that provocation may have been, if there is sufficient time for passion to subside and reason to interpose, such homicide will be murder of the second degree, at least, under the statute.

With respect to the interval of time which shall be allowed for passion to subside, the law prescribes no exact limits for it. In cases of this kind the immediate object of enquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant the mortal wound was inflicted; for if it appears from any circumstance whatever in the evidence that the prisoner reflected, deliberated, or cooled any time before the fatal shot was fired, or there was time or opportunity for cooling, the killing will amount to murder of the second degree under the statute, as being attributable to malice and revenge, rather than human frailty. As we have before remarked, it is not every provocation, even by a blow; when the party receiving it uses a deadly weapon, that will reduce the killing to manslaughter, but it depends, as we have before said, upon the time elapsing between the blow received and the mortal wound inflicted, and also upon the fact whether it was inflicted with such a weapon at the moment in the possession of the party, as was likely to produce death, or he went for it and got it and brought it from another place, and when the latter fact occurs in a case it constitutes a material circumstance in the consideration of the question whether it was inflicted in the sudden heat of blood occasioned by the provocation, or a sufficient interval had elapsed for his passion to cool and for reason to regain dominion over his mind.

The proof in the case was substantially as follows: The prisoner and the deceased were brothers, the latter being the oldest and the largest and stoutest of the two, and were employed as hands on a farm near this place, and on the day of the homicide the prisoner was sent by his employer into town for a brief purpose and was soon expected back, and on his leaving the deceased requested him to get him some tobacco, and gave him the money to pay for it; but on reaching the town he found a fire had broken out in it, and he hastened to it, and was active and efficient with many others in extinguishing it, for

which they were treated to whiskey, and after which the prisoner lingered in the town long enough to drink too much elsewhere, and to spend the money the deceased had given him without getting any tobacco for him. On his return after an absence of several hours, however, he was asked by the deceased if he had got it for him, to which he answered that he had not, and on his then asking him for the money, he smiled and told him he had spent it; on which the deceased angrily said to him, "do you take my money in that way, and then laugh in my face!" and with that struck him two blows with his fists, one on the side of his neck and the other on his cheek, on which the prisoner also flew into a passion, and swore with an oath, but without returning either blow, that he would get the gun for him, and instantly turned towards the mansion on the farm which was near at hand, for that purpose, and as he did so the deceased also kicked him once, and as he started quickly towards the house defied him to do it, and told him that if he came out there again he would skin him, the prisoner at the same time proceeding with quick steps to the kitchen of the house which he entered and through which he passed and up a stairway to a room on the floor above it where the gun then was, and retracing his steps reappeared at the kitchen door with it in his hand, and without stopping to do so, raised it and cocked it and looked at the cap of it, as he walked quickly from the house towards the deceased, who in the mean while had picked up a large weeding hoe and was then weeding the ground with it near where the collision had commenced between them, and who immediately started towards the prisoner with it raised in his hands, but had proceeded only a few steps toward him, when the prisoner aimed and fired the gun at him, and he fell mortally wounded by the discharge of it, and died in a few hours afterwards.

There was no proof in the case of any antecedent grudge or malice on the part of either of them against the other, and no expression of manifestation of such a

feeling on the part of the prisoner towards the deceased after the fatal shot was fired. And as there was no proof as to the distance from the place where the provocation was received to the room above the kitchen where the gun then was, and none as to the time which elapsed between the giving of the provocation and the shooting which soon afterwards followed it, it would be for the jury to consider and determine from the evidence before them whether a sufficient time had elapsed for the passion and anger of the prisoner to cool and subside and for reason or reflection to regain control of it and of his actions in the mean while. If you should find that there was, then the law will imply that he killed the deceased with malice aforethought, and in that case your verdict should be that he was not guilty in manner and form as he stands indicted, but guilty of murder of the second degree; but on the contrary, should you find that there was not a sufficient time for that to have taken place, then your verdict should be not guilty in manner and form as he stands indicted, but guilty of manslaughter.

As to the plea of self-defense the law on that subject is well settled, and under the facts proved it cannot avail in such a case as this. The contention on the part of the prisoner's counsel is that inasmuch as the deceased advanced with a large weeding hoe raised in his hands to encounter the prisoner with the gun in his hands pointed at him, it became a case of mutual combat between them with equally dangerous and deadly weapons, and as the prisoner was then in imminent danger of being killed or grievously wounded by the deceased, to save himself from that immediate danger, he was justified or excusable in law in shooting and killing the deceased, particularly as it was in a conflict which he had provoked and courted from the beginning of the altercation between them. But to constitute and establish such a defense in any case the law requires that the party killing was not only in imminent and manifest danger of losing his life, or of suffering enormous bodily harm and was closely pressed

by his assailant, but that he sought to avoid it, and retreated from it as far as he conveniently and safely could, and that the killing of the assailant was necessary after having done this to protect his own life, or save himself from such bodily harm. Had such been the conduct of the prisoner in this case, he would have been entitled to a verdict of acquittal at the hands of the jury, but the evidence does not present such a case, and it is therefore insufficient to warrant such a verdict.

As to the State and condition of the prisoner at the time the act was committed, so far as drunkenness or intoxication was concerned, the jury must consider and determine as to that from all the facts and circumstances in evidence before them in the case, the rule of law on that subject being that drunkenness or intoxication is no excuse for crime, unless it is so great as to render the party unconscious of what he is doing at the time.

The verdict was "guilty of murder of the second degree."

THE STATE v. JOSEPH W. PRATT.

The statute by which the two degrees of murder are established does not in any respect change the general law of murder. The common law definition of murder, together with all the rules and principles applicable to the crime remain as they were before the passing of the statute. Its only effect is to graduate the punishment according to the degree. Murder in the first and second degree and voluntary manslaughter defined.

If a husband finds another in the act of adultery with his wife and in the first transport of passion excited by it, then and there kills him, it will not be murder, but manslaughter only. It is not necessary, however, that he should witness an act of adultery committed by them. If he saw the deceased in bed with his wife, or leaving it, or found them together in such a position as to indicate with reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it, the effect will be the same; and if under such circumstances the mortal

blow was then and there given, the killing will be manslaughter merely. But no other knowledge on the part of the husband, however positive, otherwise acquired of their adulterous intercourse, can suffice to mitigate and reduce the killing from the crime of murder to manslaughter.

In order to exempt a person from responsibility for a criminal act on the ground of partial insanity, the controlling power of it, whether arising from insane delusion, or from a real cause, must be so intense and overwhelming, as utterly to deprive the party of his reason in regard to the act charged as criminal. And the enquiry in a case like this is always narrowed down to the question of the insanity of the prisoner at the time of the commission of it, and in respect to the criminal act charged against him. Was he at the time, and as touching that act, sane or insane? If he had sufficient mental capacity at the time of committing it, to distinguish between the right and wrong of that particular act, and to know that it was wrong, he is criminally responsible for it. And as every man is presumed in law to be sane and possessed of a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury, and the alleged insanity of the prisoner at the time of committing the crime charged against him is set up as matter of defense to it, the burden of showing it lies on the prisoner. It must be proved like any other fact to the satisfaction of the jury. If the proof of it does not arise out of the evidence offered by the State, the prisoner must prove it to the satisfaction of the jury beyond a reasonable doubt; otherwise the presumption of sanity or soundness of mind will remain un rebutted and in full force.

New Castle County, May Term, 1867. At a Court of Oyer and Terminer held at this term, Joseph W. Pratt was indicted and tried for the murder in the first degree of Joshua Pusey Smith, in the city of Wilmington on the 29th day of April preceding. It appeared from the evidence that both of the parties had formerly resided and been intimate acquaintances in the State of Pennsylvania, but had removed with their families a few years before to the city of Wilmington, the deceased in the year 1858 or 1859 and the prisoner in 1864, and that the deceased at the time of the alleged murder was keeping the Indian Queen hotel in that city, and the prisoner and his family, consisting of himself, his wife and a son fourteen years old resided in a house on Seventh street owned by the

deceased. In 1865 the prisoner made a protracted visit to West Virginia leaving his family in Wilmington, but returned there on Monday, the 15th of last month, and went the next day to the city of New York and came back to Wilmington at midnight on the next Friday, the 26th of that month. The deceased was at that time having some of the rooms re-papered in the second story of the house in which the prisoner and his family resided, and was in the house on Saturday, the following day, to see how the work was progressing, and to learn what Mrs. Pratt, the wife of the prisoner, thought of the new paper he was having put on the rooms. That morning the prisoner played checkers with his son while his wife was preparing breakfast, but after breakfast he walked about the house from one room to another without staying long in any one place. Afterwards his wife went to market and he went with her, and they returned to the house together between 8 and 9 o'clock. He then sat down in the sitting room and talked with his wife in the presence of the young woman who gave this evidence, and afterwards left the house with his son, and returned without him about 3 o'clock in the afternoon while his wife was preparing dinner, and soon after he and his wife sat down and took dinner together. On leaving the house with his son they went together to the railroad depot where he purchased two tickets, one for himself to Elkton and the other for his son to Newark, and sent him there to collect two bills for him by the half past 9 o'clock A. M. train, and who did not return until the following Monday after the fatal attack had been made upon the deceased. The call of the deceased before mentioned at the house that morning was after the prisoner and his son had left it as above stated, and while there he requested the prisoner's wife to go to the rooms above to assist him in measuring them for the paper, and she complied with his request.

The witness then stated that she returned to the house of the prisoner the following Monday morning about half

past 7 o'clock, and finding the front door locked went round to the back door and was let into the kitchen door by him with a friendly "good morning," and she passed from it into the sitting room. The prisoner then came into the sitting room from the kitchen without any coat on and complained of having the headache, but soon went out into the kitchen again, and his wife went up stairs, but soon a woman came in for a moment, the prisoner put on his hat and went into the sitting room, and which he again re-entered through the entry door as the woman was passing out of it. He and his wife then went out of it into the kitchen and shut the door and remained there some time, and were there when the deceased entered the front door, walked to the sitting room door opening into the passage, looked in and bidding her good morning as she sat sewing by the window in it, and enquired of her if the paper-hangers had come, she informed him they had and had been at work some time, he at once turned from the door and went up stairs, but had hardly more than reached the head of them and the floor above, before his wife re-entered the sitting room from the kitchen followed by the prisoner, when she observed to her that Mr. Smith had come, to which she replied that she had heard him when he came in. The prisoner then proceeded to the entry door, but halted for a second perhaps, at the foot of the settee just at the door, then passed out of it and ran rapidly up stairs, while his wife looked anxious and worried and walked towards the mantle, clasped her hands, and then passed into the parlor and closed the door which led into it from the sitting room. In a very short time afterwards she heard a sudden noise above and then a sound as if two or three persons were running down stairs together, a woman screamed, and immediately afterwards she heard some one run down the first flight of stairs and through the entry to and out at the front door. The prisoner immediately afterwards opened the entry door into the sitting room and walking towards her exclaimed, "he has ruined my wife! he has ruined my wife"! and then, "my God

what have I done! My poor mother! My poor child!" and repeating these words several times he laid down on the floor with his face towards it. His wife also came into the sitting room just at that moment and said to him "Joseph, what made you do it? It was done without a cause. See what temper has brought you to." She then went to the front door and looked out, closed it and came into the sitting room again, then went into the kitchen and returned with a pail of water and a broom, and asked her if she would not wash the blood off the front steps and the pavement, for the whole town was in an uproar, and which she did for her. There was a good deal of blood marking the flight of the deceased down the stairs and through the entry, as well as on the front steps and the pavement. She saw nothing of her when she went back into the sitting room, but the prisoner was still lying on the floor of it with his face turned towards it, as when she went out of it. She then put on her hat and shawl and went home, and was not there any more that day. That was Monday, the 29th day of last April, and it was after 10 o'clock that morning when she reached home. When she heard the woman scream she recognized the voice as that of the prisoner's wife. There was blood running from her right hand when she first came into the sitting room after the disturbance had occurred, and she saw on the following Wednesday that the middle finger of her left hand had been severely cut.

The foreman of the paper-hangers who was the next witness, stated that he was at the house of the prisoner on Saturday, the 27th day of April last, at work papering the front room in the second story of it, and about half past 4 o'clock he heard the front door open and a person come in and with a quick and heavy step pass from it into the back parlor or sitting room, and in a minute after, Mr. Smith, the deceased, came up into the front room where he was at work, made some remarks about it and the paper, seemed pleased with the appearance of it, and soon left; and he left it, without finishing the papering of it,

about 7 o'clock that afternoon, and returned to his work upon it about half past 7 o'clock the next Monday morning, and after taking up into the room some paper he had brought with him, he went down into the sitting room to get a table where he saw a young woman sitting at the window sewing, but saw nothing of the prisoner or any other man about the house that morning, until about half past 9 o'clock when he heard the front door open and a person enter with the same quick and heavy footsteps, as on Saturday, and very soon Mr. Smith came up stairs and into the front room where he was, and again said he was pleased with the paper, and then turned on his heel and went out into the entry, and up the next flight of stairs into the third story he was satisfied, for had he gone down stairs he would have seen him; and in two or three minutes afterwards he heard a noise above as of the shuffling of feet or persons moving quickly over the bare floor, and very soon what sounded like a fall or a heavy jump upon it which jarred the windows and seemed to shake the house itself, and just then a lady's voice and a sudden shriek with the words "my Lord, Joseph what have you done"! and immediately after that footsteps coming fast and heavy down stairs and along the entry below until they seemed to pass out of the front door of the house; something was said by the lady before he heard the shriek, but he did not understand what it was she said. He also heard apparently light footsteps following the fast and heavy ones, down stairs immediately afterwards, but he saw no one as the door of the room was closed during the whole time. Another at work in the same room with him at the time was then examined as a witness and made the same statement with the addition, that he heard no one come up the first flight of stairs, or go up to the third story after the deceased had come up to the room they were at work in, or after he had left it and gone up into the third story, but soon after the fast and heavy steps were heard going down stairs and out of the front door, he heard some one slowly coming down stairs groaning, and when he got

down stairs into the sitting room he heard him say, "Oh, my God." But just before that he heard light footsteps, and then in a minute after a person coming slowly down groaning as before mentioned.

The evidence for the State further showed that the wound was inflicted in the front room in the third story of the prisoner's house, and consisted of a single stab about four inches below the top of the left shoulder, being behind as well as below it, or on the back part of the left arm-pit, and extending around towards the front, two and a half inches in length and four inches at least in depth, made with a dagger or sheathed knife which was soon afterwards found lying on the floor with fresh blood on it, and with the scabbard or sheath of it also lying on the floor not far from it; and which were produced and proved and put in evidence. The deceased was so much exhausted by the flow of blood from it that he was unable to reach his home at the Indian Queen Hotel and died about 10 o'clock that morning. The physicians who had reached him but a few moments before he expired were of the opinion that the wound was not necessarily mortal, if he could have immediately had the proper attention and treatment from them, but under the circumstances it was a mortal wound and the cause of his death.

The evidence for the prisoner by a number of witnesses from Kimballville in Pennsylvania eighteen miles above Wilmington, showed that he and the deceased had long resided in that vicinity and were very intimate friends prior to their removal to Wilmington, and that whilst the prisoner was the keeper of a hotel in that place, and the deceased owned and resided on a farm a mile from it, he was a frequent visitor at the hotel, and more so when the prisoner was from home than when he was there; that when the prisoner was at home he always drove up and lighted from his carriage in front of the hotel and would have a friendly salutation with every one he knew about it, and acted as others did, but when he was away from home he always drove around and lighted in the yard in the rear

of the hotel, walked into the bar-room and took a drink, and then into the sitting room where he spent the whole of his stay in company with the prisoner's wife, and that he sometimes spent the night at the hotel, but never when the prisoner was at home; and according to the testimony of the bar-keeper that one night which he spent at the hotel in the absence of the prisoner, he came into the bar-room and told him he wished to go to bed, and that she had before informed him to put him in the front room, which was next to hers, and having left his over-coat in the bar-room, and knowing that he always left the hotel very early, before retiring himself, he took it late at night up to his room, but found he was not there, although the bed in it had been occupied that evening. Afterwards the prisoner left the hotel, and took a private house in the place and removed his family to it, and the deceased was then observed according to the testimony of several witnesses, one of whom then resided next door, to continue his visits to the family, and frequently when the prisoner was away to stay all night at the house, and to leave it by the back-way early in the morning.

The son of the prisoner who had been examined as a witness on behalf of the State, was now recalled and examined as witness on his behalf, and stated that on the removal of his father's family to Wilmington they first resided in French street about a year, then removed for a year to No. 703 Jefferson Street, and from there to No. 523 Seventh Street on the 25th of March 1866. That his father and Mr. Smith were very friendly, and that he was intimate with their family. He used to come often to their house when they lived in French and in Jefferson Streets. His visits were to his mother, for he would come when his father was away, as he was always at his office in Sixth Street, except at meal times. His father went away to West Virginia while they lived in Jefferson Street, and after that his visits to their house were oftener than before. He had seen him there as often as seven times a week. He would come about seven o'clock in the

evening and stay a good while; that was at the house in Seventh Street after they moved there. He often sent him out for refreshments, ice cream, oranges or apples; they then had no family but himself and his mother. He had sometimes known him to leave before he went to bed. In August last year his mother went away and he went into the country on a visit to Louisville, Pa., and he wrote to his father in West Virginia that she had gone away and that he thought she was at his uncle's, Thomas Slack's, but afterwards wrote to him correcting it and told him she was at Mr. Hanse's. His father then came home. After that he had a suspicion that all was not right, and coming down stairs he found him in the dark without his coat, vest or shoes, and on two occasions in their back yard after nine o'clock at night, and when his father again came home in October last he told him of it. Another witness residing on Seventh Street testified that he had seen the deceased go to the house of the prisoner on that street almost every day.

Maxwell B. Ocheltree another witness for the prisoner stated that he was associated with him in business as real estate agents from June 1864 to June 1865 when the prisoner went to West Virginia, and that the prisoner and the deceased were intimate and particular friends, and the prisoner reposed entire confidence in him. When he came back in August last, the deceased was away from home, and he apprised him of the reports in circulation in relation to the improper intimacy between his wife and the deceased both in Wilmington and at Kimballville, at which he seemed thunderstruck and utterly speechless, for he held down his head and made no reply. The next time he saw him was on his return to Wilmington again in the month of October last, in the bar room of the deceased at the Indian Queen hotel. They were there together, and they went from there to a private room together to have a talk over the matter, but he declined to accompany them, although he was invited by both of

them to accompany them. The next time he saw the prisoner was during the evening of that day walking up Fifth street with the deceased. He stopped and bade him good bye, and did not see him again until he saw him in prison.

Higgins, Deputy Attorney General, contended that even if the criminal intimacy between the deceased and the wife of the prisoner were conceded, if the act of killing was preceded by deliberation and premeditation, it could constitute no provocation to excuse or mitigate the offense, for unless it was done by the prisoner when the deceased was in the act of adultery with her, it would be murder with express malice aforethought, and of the first degree under the statute. *Foster's C. L.* 296. *Rev. Code, Chap. 127, Secs. 1,5.*

T. F. Bayard, (*Wayne MacVeagh* with him), contended that the circumstantial and presumptive evidence in the case was sufficient and all that the law required to establish the fact of a long continued adulterous intercourse between the deceased and the wife of the prisoner at the bar. *Loveden v. Loveden*, 2 *Hazzard*. And whilst the discovery of that fact was sufficient to overwhelm the mind and reason of the prisoner for the time being, at least, the evidence clearly showed that he was utterly beside himself, crazed and insane that morning and at the time when he committed the fatal act, and that he was not criminally responsible for it; and at the moment he dealt the blow that he could not have been conscious of what he was doing. *Windsor's Case* 5 *Harr.* 512. On this point he also read from a recent charge to the jury by Judge Brewster in a case in Pennsylvania not yet reported, except in the newspapers, as follows; if the jury believe from the evidence in the case that the prisoner committed the act of killing, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he was not guilty in law, and

should not be convicted of any crime. If the jury believe that from any predisposing cause, the prisoner's mind was impaired, and that he was mentally incapable of controlling or governing his acts at the time the homicide took place, they must acquit him. The question of fact implied in each of the foregoing points, like all others in the case, were open questions to be decided by the jury beyond all reasonable doubt against the supposition that the prisoner's mind was in any degree impaired by disease so as to render him unconscious of his acts, incapable of controlling them, or of properly judging of their nature with reference to the crime of murder, before they could convict the prisoner of the crime wherewith he was charged. The law does not require that insanity shall be shown to exist for any definite period, but only that the accused was suffering from a paroxysm of mental disease, whether short or long, at the time the act took place of which he is accused of committing. And he asked the Court to instruct the jury that if they had a doubt of the sanity of the prisoner, or if the preponderating weight of the evidence, direct and circumstantial, was that the prisoner was insane at the time he committed the fatal act, they must give him the benefit of the doubt, and wholly acquit him in the case. *Commonwealth v. Yorke*, 9 Met. 93. *Benn. & Hurds' Ld. Ca.* 522.

Moore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury. It is my duty, as well as my purpose, on the present occasion, to explain to you, as briefly as I can, so much of the law of homicide, as is applicable to the crimes of murder and manslaughter. And I take leave to say to you, in the outset, that no mere words, however violent, reproachful or offensive, can amount in law to a provocation sufficient to excuse even the slightest assault. And further, that even a slight assault will not excuse the use of a deadly weapon, so as to mitigate the offense, and reduce it below the grade of murder, in case death ensues from its use.

In order to reduce the crime to manslaughter, the provocation must be very great,—so great indeed, as to produce such a transport of passion,—or frenzy of the mind,—and heat of blood, as to render a man, for the time being, altogether deaf to the voice of reason. It must, in fact, be made to appear, by the evidence, to the satisfaction of the jury, that the killing was not the result of deliberate design or purpose, nor attributable to preconceived malignity of heart; but, on the contrary, was only and solely imputable to human infirmity or frailty. Whilst, on the one hand, murder always proceeds from a wicked depraved and malignant spirit,—from a heart regardless of social duty and perversely bent on mischief, and is always characterized by malice as a necessary ingredient;—manslaughter, on the other hand, results from acts of unpremeditated and thoughtless violence, and not from any malignity of heart,—acts proceeding from sudden heat of blood, and unreflecting rage, caused by adequate provocation, and not from deliberate design or purpose. Malice is the great test or criterion of murder. It distinguishes it from manslaughter. Malice is always present in murder as its characteristic and distinguishing feature;—but, in manslaughter, it is always absent; and hence, I say to you that wherever malice is shown to have been the impelling cause of the act committed, from which death has ensued, the crime must necessarily amount to murder. And I charge you further, that if the slayer, in the act of killing, exercised thought, consideration and reflection, and did the fatal act of purpose and design, his offense, instead of being reduced to manslaughter, will be murder; for, wherever there is thought, coolness and reflection, coupled with a purpose and design to take life, there is malice,—and malice, being the moving cause of the act, makes murder.

Having thus briefly, but I trust with sufficient plainness, explained to you the difference between murder and manslaughter, I may now say to you in further elucidation of the subject, that malice, legal malice, characterizes all

acts perpetrated with an evil intent,—all wrongful acts done intentionally without just cause or excuse, and in willful disregard of the rights or safety of others. Such is legal malice.

Now, gentlemen, let me say to you another word or two in regard to the question of malice. In the first place, I charge you, especially, to remember, during your entire deliberations, that whenever the fact of killing has been once proved, all circumstances of accident, necessity, or infirmity and of alleviation, extenuation, justification, or excuse, must be proved to your satisfaction by the prisoner, unless they happen to arise out of the evidence produced by the State against him; for the law, which is to be your guide in dealing with the evidence, presumes the fact of killing to be founded in malice, and therefore, amounting to murder, until the contrary is made to appear. And you will also bear in mind, in this connection, that malice in killing constitutes the murder. Under the law of this State, murder is divided into two degrees—first and second. Murder in the first degree, is where the crime is committed with express malice aforethought; and murder in the second degree is where the crime is committed with implied malice; which implied malice is an inference or conclusion of law, from facts actually proved. The statute, by which these two degrees of murder are established, does not in any respect change the general law of murder. The common law definition of murder, together with all the rules and principles applicable to the crime, remain as they were before the passing of the statute. Its only effect is to graduate or measure the punishment according to the degree.

Express malice may be defined to be where one person kills another with a sedate, deliberate mind and formed design, which formed design to kill, may be manifested in many ways, as for instance by laying in wait for the deceased, or by antecedent menaces or threats, disclosing a disposition on the part of the slayer to commit the act charged, or by former grudges, that is to say,

former ill-will, secret enmity, hatred, or sullen malevolence, towards the deceased, or concerted schemes to do him great bodily harm, or any other circumstances, calculated to disclose the inward fatal purpose or intention of the accused towards his victim.

Implied or constructive malice, being as I have already said, an inference or conclusion of law from facts actually proved before the jury, is implied by law from every deliberate, cruel act committed by one person against another, however sudden the act may be. For the law considers that he who does a cruel act voluntarily, does it maliciously.

And now, gentlemen, in order that you may have a definite idea of the distinction between the two degrees of murder, I here say to you, first, that wherever there exists a design or intention, deliberately formed in the mind of the accused, to take life, and death ensues from his act, it is murder with express malice, and consequently murder in the first degree. Secondly, where there exists no design or intention to take life, but death results from an unlawful act of violence on the part of the accused, and in the absence of adequate or sufficient provocation, it is murder with or by implied malice, and therefore murder in the second degree.

Again, the difference between murder and voluntary manslaughter may be seen in this:—voluntary manslaughter is the killing of another in sudden heat of blood, upon adequate provocation, and without malice, either express or implied; and therefore, where death ensues from such unpremeditated and thoughtless violence, upon sufficient provocation and without malice, it is manslaughter only. The law justly and mercifully requires that an act of violence, in order to amount to murder, must be done deliberately. But it is proper that I should say to you, and I say it emphatically, that no specific length of time is necessary to make an act a deliberate act in legal contemplation; for every act which is done designedly and of purpose, is in point of law, esteemed

to be a willful act, every willful act an intentional act, and every intentional act a deliberate act, so that if death ensue from such an act, it must be held to be a case of malicious killing, and therefore murder.

You all know, because common sense and reason declare it to be so, that even the most sudden and instantaneous act may be attended with circumstances which show beyond doubt, that it was the result of a deliberate purpose. Time, the lapse of time I mean, need not enter into the consideration, as part of deliberation, as an essential or necessary element; for if a design or intention to take life, be but the conception of a moment, it is sufficient. And if the slayer had time for thought, and thinking but for a moment, did intend to kill, and in fact did kill, it is just the same in legal contemplation as if he had intended it for a length of time, and killing under such circumstances, is held to be both deliberate and premeditated. As a general rule, it is the intention with which an unlawful act is done, that determines its criminality. As the intention of the perpetrator of an unlawful act is rarely declared by words, and as the eye of man can not penetrate to the hidden recesses of the heart, or mind, we are necessarily compelled to resort to surrounding circumstances, and to rely on them as the external manifestations of the inward hidden intention, with which the deed was done. The intention to take life may be disclosed in a variety of ways, and especially, may such intention be disclosed by the use of a deadly weapon, a weapon likely to take life, as for instance, where one person purposely shoots at another with a gun within striking distance, or strikes him on the head with an axe or a iron-bar or heavy bolt, or purposely stabs him with a sword or dagger, for these are all deadly weapons, and the use of them, in the absence of great provocation, must compel every reflecting mind to conclude that he who does such an act intended to kill.

Again, gentlemen, it is well settled in the law, as a rule of universal application, that every man is presumed to

contemplate and intend the ordinary and natural consequences of his own acts; so that, if a deadly weapon be used against the person of another, as it has a direct tendency to destroy life, the intention to take life, is a necessary conclusion from the nature and character of the act itself.

Having thus, gentlemen, stated to you, with as much brevity as the importance of the case would permit, the principles and rules of law, which should guide you in your deliberation, I now pass to the consideration of the two several grounds of defense, urged on behalf of the prisoner, and upon which he claims an acquittal at your hands.

And first, as to the adulterous intercourse, alleged to have existed between the deceased, Joshua P. Smith, and the prisoner's wife. The law on this subject is very plain and very easily understood; it is this: If a man find another in the act of adultery with his wife, and in the first transport of passion kills him, he is guilty of manslaughter only.

It is not sufficient to show that an adulterous intercourse has been, for some time prior to the act of killing, carried on between the deceased and the wife of the prisoner; nor is even positive knowledge on the part of the prisoner of such adulterous intercourse sufficient to mitigate the offense, and reduce it from the crime of murder, to manslaughter. No, it is not so. No matter with what certainty, or conclusiveness, the fact of adultery may have been proved, or how frequently, or how recently, the fact of adultery may have occurred, it amounts to nothing, even in mitigation of the offense, unless the prisoner found the deceased in the very act of adultery with his wife. The deceased must be taken in the very fact, and the accused must act, and act at once, under the sting of the then present provocation, and in the first transport of passion excited by such provocation. Nothing short of this will do. No suspicion, however vehement, no belief, however well founded, no knowledge however posi-

tive and absolute, that an adulterous intercourse has previously existed, between the deceased and the prisoner's wife, can have the effect of mitigating, or reducing the crime, below the grade of murder.

I have already intimated to you that if the prisoner found the deceased in the act of adultery with his wife, and then, in the first transport of passion, excited by the then present provocation, killed the deceased, he is not guilty of murder, but of manslaughter only. For the law, in compassion for human infirmity, extends its indulgence to acts, springing from sudden passion, justly excited, by adequate provocation, when committed instantly, or before reflection has intervened, or reason has had time to resume its controlling power. But if the slayer, instead of killing the adulterer in the act, or, at the time of the adultery committed, kills him on the ground of suspicion or belief, or even on the ground of clearly ascertained and known previous adultery, his case is without palliation or excuse, and he is justly held to be guilty of the crime of murder. Killing under such circumstances, is not killing under adequate provocation; on the contrary, rather, it is killing from a feeling of hatred and revenge. And, gentlemen, allow me to say to you, in this connection, that whatever act is done, upon revenge, is done willfully, deliberately, and with malice, and, if death ensue, as the result of such act, it is murder.

In charging you, as I have done, that in order to reduce the crime from murder to manslaughter, it is necessary it should be shown, that the prisoner found the deceased in the very act of adultery with his wife. I do not mean to say, that the prisoner must stand by and witness the actual copulative conjunction between the guilty parties. If the prisoner saw the deceased in bed with the wife, or saw him leaving the bed of the wife, or if he found them together, in such a position, as to indicate with reasonable certainty to a rational mind, that they had just then committed the adulterous act, or were then and there about to commit it, it will be sufficient to satisfy the re-

quirements of the law in this regard, and if, under such circumstances, he then and there struck the mortal blow, his offense would amount to manslaughter only. But if he did not so find the deceased and his wife, in the act of adultery, but struck the mortal blow, in revenge for previous adultery, either suspected or known, he is guilty of murder.

The other ground of defense, relied on by the prisoner, is insanity; and, therefore, it is proper I should also explain to you the law on this subject. Insanity may be either total, or partial, in its character. So, also, it may be total and permanent; or, although total in its nature, it may be but temporary, in point of duration. Of course, a person totally and permanently insane, is incapable of committing any crime whatsoever; because, the will and judgment of the man, being overborne and obliterated by the malady, his act can not, justly, be considered the voluntary act of a free agent, but rather, the mere act of the body, without the consent of a directing or controlling mind. So, too, in regard to total, but temporary insanity. If the insanity be such, for the time being, as to utterly overwhelm the reason and conscience, the will and judgment, the accused can not justly be held criminally responsible for acts done during the continuance of such temporary insanity.

As I have just intimated, there may exist a state of mind called partial insanity, sometimes denominated in the law, monomania, or insane delusion, which delusion, consists in a fixed belief in the existence of certain things, purely imaginary, as real facts, when in truth they have no real existence whatever.

Insane delusion is that diseased state or condition of the mind, which gives to airy nothing a local habitation and a name. But in this case, it is insisted that the cause was not imaginary, but that it was real and substantial.

Now, whether partial insanity is of such a character as to exempt a person from criminal responsibility for wrongful acts, is always a question of vital importance; and its

solution must necessarily depend upon the nature and intensity of the delusion, the force or degree of its controlling power over the will and conscience,—and especially and above all,—whether the act which is charged as constituting the crime, was committed under the direct and irresistible influence of such insanity. Partial insanity, even when it is clearly shown to exist, is not always or necessarily an excuse for crime. There are many varying shades of it—many degrees of it. It may becloud the intellect but a very little, or, it may becloud it utterly, in respect to a particular subject. In order to exempt a person from responsibility for a criminal act, the controlling power of the insanity, whether arising from delusion or from a real cause, must be so intense and overwhelming as utterly to deprive the party of his reason in regard to the act charged as criminal. The enquiry is always in a case like this, narrowed down to the plain, sharp question of the insanity of the prisoner at the time, and in respect to the criminal act charged against him. Was he at the time, and as touching that act, sane or insane? The insanity must have specific reference to the particular act charged as constituting his offense. The question is not whether he was insane on any subject whatever, but whether he was insane in respect to the particular act charged against him. If it were otherwise, there would be a total exemption from punishment for crime committed under any species of partial insanity, notwithstanding the fact that such insanity might not in any degree have impaired the mental capacity of the accused, to distinguish between right and wrong in respect to the particular act charged as constituting his crime. If the prisoner had sufficient capacity at the time to distinguish between the right and wrong of that particular act—if he had sufficient capacity to know that that act was wrong, he is responsible for it, and for all its fatal consequences.

If, however, you shall be satisfied from the evidence before you, that at the time when the mortal blow was given, the prisoner had not a sufficient degree of reason

to enable him to distinguish between the right and wrong of that act; if, in other words, his reason was at the time so overborne or obliterated as to render him incapable of knowing or comprehending that that act was wrong, he is not criminally responsible for it, however fatal the result may have been. But, if at the time the act was committed, he possessed sufficient mental capacity to comprehend the nature or character of the act and its probable consequences; or if he understood the nature of the act he was doing, and had reason sufficient to know that it was wrong to do it, he is legally and justly responsible for such act, notwithstanding he may at the time have been laboring in some degree under partial insanity. For, after all has been said that can be said in elucidation of the subject, we are compelled to return to the plain and simple question whether the prisoner, at the time he committed the act, had sufficient mental capacity to distinguish between right and wrong in respect to that act. If he had, he is responsible; if he had not, he is not responsible. Now, in this case, the criminal act charged against the prisoner is the felonious killing of Joshua Pusey Smith with express malice aforethought, to which charge, as we have seen, he sets up the defense of insanity, and claims at your hands an acquittal on this ground. If he has sustained this plea by satisfactory evidence, he should be acquitted; if he has failed to establish the fact of insanity by satisfactory proof, he ought not to be permitted to escape punishment on this ground; and if he killed the deceased, he should be convicted. And now, gentleman, before taking leave, altogether, of the question of insanity, it is my further duty to state to you, at least briefly, certain primary and cardinal rules or tests, by which, under your oaths, you must be guided, in order to arrive at a proper solution of this question.

The first great rule, on this subject is this: Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury. This rule

is fundamental, and of universal application; it meets you at the very commencement of your enquiries, and you must carry it with you in all your deliberations. You must, therefore, gentlemen, fully understand and remember, throughout all your investigations that the prisoner is to be considered by you, to be a sane man, and capable of committing crime, until his insanity shall be clearly, or satisfactorily established by the evidence; on this ground you must take your stand, firmly and squarely, if you expect ever to arrive at a just or proper decision of this case.

In the next place, insanity being matter of defense, the second great rule is, that the burden of showing it, lies on the prisoner. It must be proved as any other fact, to the satisfaction of the jury. If the proof does not arise out of the evidence offered by the State, the prisoner must establish the fact of insanity by distinct evidence and prove it, beyond a reasonable doubt; otherwise the presumption of sanity or soundness of mind will remain un rebutted and in full force. Exhibitions of mere eccentricity of mind, manner, or conduct, mere passionate jealousy, or vehement suspicion of adultery, however well founded, or showing that the prisoner was at times afflicted with a sort of mental strabismus, or squinting of the mind, will not be sufficient to excuse him from the consequences of his criminal acts. The law requires more than this; the proof must go beyond this; the proof must establish the fact, that the prisoner, at the time he committed the act of killing, was incapable of distinguishing between right and wrong in respect to that fatal act.

Having thus stated to you the general law of felonious homicide, as well as the rules and principles of law applicable to the grounds of defense relied on by the prisoner, I now reverse the order in which I have presented these several matters, and charge you, in conclusion, as follows:

First. If you shall be satisfied from the evidence, beyond a reasonable doubt, that the prisoner, at the time he struck the mortal blow, was laboring under such a

disease of the mind as to render him, for the time being, incapable of distinguishing between the right and wrong of that act, you should acquit him, on the ground of insanity, and should so return your verdict.

Secondly. If however, you shall not be satisfied from the evidence that he was, at the time of committing the act, an insane man, then it will be your duty to consider, whether he found the deceased in the act of adultery, with his wife, and then and there, in the first transport of passion, instantly inflicted the mortal blow. If you shall be satisfied from the evidence that the prisoner killed the deceased, Joshua P. Smith, in such a position, under such circumstances, then he is guilty of manslaughter under our statute, and your verdict should be guilty of manslaughter in killing the said Joshua P. Smith whilst in the act of adultery with the prisoner's wife.

Thirdly. But if you shall not be satisfied from the evidence, that the prisoner found the deceased in the act of adultery with his wife and then and there, in the first transport of passion, instantly struck the mortal blow, but that, on the contrary, he killed the deceased on the ground of previous acts of adultery, then, we say to you, that he is guilty of murder, either in the first or second degree, and in which degree you must determine from the evidence.

And in order to aid you in passing on this question, I repeat to you, that wherever there exists a design or intention deliberately formed in the mind of the accused to take life, and death ensues from his act, it is murder with express malice, and therefore, murder in the first degree.

But where there exists no design or intention to take life, but death results from an unlawful act of violence on the part of the accused, and in the absence of adequate or sufficient provocation, it is murder by or with implied malice, and consequently murder in the second degree.

Verdict—"Not guilty, by reason of insanity."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* MOSES RASH.

So far as the act of Congress, termed the civil rights bill, assumes to compel, regulate, or control the admission of evidence in the courts of this State, it is inoperative, unconstitutional and void.

The negro on whom the assault and battery alleged in the indictment was committed, is a competent witness on the trial of it for the prosecution against a white man, although there was a white witness present when it was committed.

Court of General Sessions, &c., Kent County, October Term, 1867. Moses Rash, the defendant, was indicted for an assault and battery committed on Samuel Derry, a negro man. There was no formal opening of the case to the jury. The jury having been sworn, Mr. Draper, the Deputy Attorney General, stated to them, that they were empaneled to try the defendant for an assault and battery, as charged in the indictment, and without further remark proceeded to call his witnesses. "The first witness called was a negro man, named Berry. He took his place at the witness stand ready to testify, when the counsel for the defendant objected to his competency, on

the ground of the Act of Assembly of February 3, 1799, the eighth section of which was re-enacted in 1852 and is to be found in section 4 of chapter 107 of the revised code; which section declares, that in criminal prosecutions, a free negro or free mulatto, if otherwise competent, may testify, if it shall appear to the Court that no competent white witness was present at the time the facts charged is alleged to have been committed, or that a white witness being so present, has since died, or is absent from the State, and can not be produced."

Comegys, for the defendant. There was a competent white witness present at the time the alleged assault and battery occurred, that he had been subpoenaed, and was then in Court ready to be produced on the call of the State.

Draper, Deputy Attorney General. The objection of the counsel for the defendant, brought up the question of the constitutionality of the civil rights bill; and he proceeded at once to state the ground upon which he claimed that the evidence of the negro was admissible, and to discuss briefly the question thus raised. He insisted that the civil rights bill was the supreme law, and as such, was binding on all courts whether state or federal, and that any state law which came in conflict with it was rendered null and void. And, in support of these positions, he contended that the power to pass the act in question was expressly conferred upon Congress by the recent amendment of the constitution of the United States, which declares (1) that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been convicted, shall exist within the limits of the United States, or any place subject to their jurisdiction." And (2nd) that "Congress shall have power to enforce this article by appropriate legislation."

Comegys replied in support of his objection, and against the constitutionality of the act of Congress, and argued

the question with ability and at considerable length. No suggestion was made by either of the counsels, that the negro called to the stand as a witness, was the person upon whom the assault and battery had been committed.

The Court, Gilpin, C. J. This is the first time the constitutionality of the civil rights bill, or any provision of it, has been formally presented and argued, and submitted for the decision of this Court. At the first term of the court in the county of Sussex, I think, which was held after the passage of the act of Congress, and also, at the terms which immediately followed in Kent and New Castle, upon trials of negroes for felonies, I took occasion to announce to the gentlemen of the bar that whenever the question of the constitutionality of the civil rights bill as touching proceedings in the Courts of this State should be made and argued we should hold ourselves bound to decide it. From that day to this, no one in either county has shown sufficient interest in the question to present and argue it, and so the question has remained undecided up to this time.

The precise question raised by the objection of Mr. Comegys on behalf of the defendant, namely, the right of a negro to give evidence in the Courts of this State, against a white person by force of the civil rights bill, and in contravention of our own act of assembly, has never hitherto been presented for our consideration, has never hitherto arisen here. It has, however, frequently arisen in other States, and it is certainly a matter of regret that the question has not been passed upon by the Supreme Court of the United States.

It may possibly turn out that the testimony of the negro man called as a witness, may be properly admissible on another ground. However, the question now before us for decision, is the competency of the negro to give evidence in this Court by force of the civil rights bill and I am not disposed to evade it. It may as well be set-

tled now, so far as the Court is concerned, as at any other time, since, otherwise, it must necessarily still continue to confront us.

The exclusion of negroes as witnesses is believed to date back to the time when slavery was first introduced into this country. Indeed we know of no period in our history when they were held competent to testify against a white person in any case, civil or criminal, except under special conditions as provided for by the acts of 1787 and 1799. The common law doctrine that slaves were competent witnesses, has never been recognized in this State; on the contrary, the rule of exclusion has always prevailed as settled law. As slavery was exclusively confined to the black or colored race, color became the badge or sign of servitude, and the rule of exclusion was extended and applied to all who bore that badge whether slave or free. And so the law continued to be until modified by the acts of Assembly to which I have just referred.

I think it is a mistake to assign as the ground of their incompetency, the want of sufficient mental capacity or intelligence to speak the truth. It seems to me rather, that the theory or ground upon which they were excluded was an assumed defect of moral character on their part, superinduced by their ignorant, degraded and servile condition. They were slaves. They were subject, body and mind, to the absolute control of their masters, and were bound to obey their master's will in all things. In course of time some of them were set free, and were recognized by the law as free. But the rule of unqualified exclusion remained in full force until the legislature, by the acts of 1787 and 1799, recognized free negroes as possessing certain civil rights, to wit: the right to hold property, and to obtain *redress* in law and equity, for any injury to person or property, and allowed them, under certain circumstances, to give evidence against white persons. Now I do not intend that my opinions, in regard to the law which excludes negro testimony, shall be misunderstood. I hold the law to be wrong and indefensi-

ble. The condition of things has changed. The reason for the rule of exclusion has ceased to exist. The negroes are now all free, and there no longer remains any good reason why they should not be allowed to testify. I speak for myself on this point. I think the continuance of the law inexpedient and unwise, and that it should be repealed, and that negroes should be made competent to testify in all cases in which white persons, under like circumstances, are held to be competent. Their credibility would still be left to a white jury. Moreover, their evidence is becoming every day more and more important to the white race, to say nothing of its importance to the black race.

And now, as to the civil rights bill, or rather, as to the power of Congress under the constitution to prescribe a rule mandatory in its nature requiring a State Court to admit a negro as a witness to give evidence before it. Has Congress power to do this? Has Congress power to prescribe rules of evidence, and regulate the mode of proceeding in a State Court? Or, in other words, has Congress power to compel a State Court to admit a certain class of persons to testify in contravention of a State law?

Prior to the adoption of the constitutional amendment, it was always and everywhere conceded that Congress had no power to regulate the remedy in State Courts, but that this power belonged exclusively to the States, respectively. Now, the admission or rejection of evidence, the competency or incompetency of a witness, touches the remedy; and the remedy, as we have said, has hitherto always been considered as being subject to state regulation and control. Even in regard to contracts, the States may modify the remedy, as they please, provided they leave some remedy.

Again, it seems to have been pretty well settled, that the entire judicial power of the United States must be vested in federal courts; for the constitution expressly requires that the judicial power shall be vested in Courts

ordained and established by the United States. The constitution is imperative on this point. It would seem, therefore, quite clear that Congress cannot confer upon, or vest in a State Court any judicial power or authority, or impose upon it the duty of performing any *judicial* act or function prescribed by a federal law. A State Court derives its jurisdiction and powers from the constitution and laws of the State; and it is not and cannot be made, the instrument of Congress for the enforcement of federal laws. If, therefore, Congress cannot confer any judicial power or authority on a State Court, it would seem to follow, that it cannot compel a State Court to admit a witness to give evidence. He cannot "give evidence" before he is sworn, and he cannot be sworn without the order of the Court, the swearing of him is the act of the Court, his admission or rejection is the act of the Court, and these several matters involve the exercise of discretion and judgment, and are of a judicial character; they are not merely ministerial.

The civil rights bill contains many provisions, some of them of a very grave character. One provision of a law may be unconstitutional, and all the rest constitutional. Or a law may be constitutional as applied to the federal Courts, and unconstitutional as applied to State Courts. All that concerns us for the present, however, in regard to the civil rights bill, is the clause in the first section which declares, in effect, that negroes shall have a "right to give evidence" in State Courts. This "right" as it is called, Congress undertakes by the second section, to compel us to accord to them in this Court in fear of certain pains and penalties denounced against us in case we decline to obey their mandate. Now, it seems to me that this is an alarming stretch of federal power, an aggressive and an unconstitutional invasion of the judicial authority of the State; which, if tolerated, must ultimately prove destructive of the independent administration of public justice. The law of the State excludes the negro from testifying; the civil rights bill says he shall

have a right to give evidence; and thus there is brought about a direct conflict between the two laws. They both cannot be obeyed. And hence, the judge, in the exercise of his best judgment, arrives conscientiously at the conclusion that Congress has assumed to itself the exercise of power not warranted by the constitution; and that, therefore, the act of Congress, so far as it attempts directly or indirectly, to regulate the proceedings in the State Courts, is invalid. Was it ever before supposed by any lawyer that a Judge, who, in the discharge of his judicial functions, and in obedience to the express prohibition of a statute of his own State, should refuse to allow a certain class of persons to testify in a case pending before him, could be held criminally responsible for such refusal. Congress is not omnipotent. On the contrary, its powers are limited, and its legislation must be confined within the fair scope of the powers granted by the constitution. From the time of Edward the Third until recently it has always been considered settled law that no Judge could be held answerable, civilly or criminally, for an error of judgment in doing or refusing to do any official act in the exercise of judicial power. For an abuse of power he may be impeached, nothing else. Certain it is, that prior to the adoption of the constitutional amendment no one dreamed that Congress possessed any such power.

But it is said that the second section of the amendment confers the power upon Congress to compel State Courts to admit negro testimony in all cases in which, under like circumstances, white testimony is admissible. Well let us see whether this is a fair and reasonable construction of the amendment. Now, the second section confers no power on Congress which Congress would not have had without it. The first section makes the negro race free. It does nothing more. They are free by the Supreme Law, the constitution. The testimony of no witness is necessary to establish that fact. Under no circumstances can they be reduced to the old condition of slavery, so long as the constitution stands. And hence this freedom is as-

sured to them, unless they forfeit it by the commission of crime. So that there can be no legal involuntary servitude, but such as results from the judgment of a Court of competent jurisdiction, and in regard to that judgment and its results, the record alone can speak. But this kind of servitude is recognized as legal and proper, and the testimony of witnesses cannot discharge the party when once duly convicted.

But how are we to arrive at the true interpretation of a constitutional provision? In the first place, we must consider the end proposed to be accomplished by it; and in considering this, we must give to the words used, just such operation and force, and no more, as is consistent with their legitimate meaning, as applied to the subject matter about which they treat. Now it is perfectly manifest that the end proposed, was the abolition and extirpation of slavery, within the States and Territories of the United States. And it seems to me, to be equally clear, that the second section was intended to confer upon Congress power, by appropriate legislation, to vest in the federal Courts, just such jurisdiction and authority as might be found necessary or proper for carrying into effect the end proposed by the first section of the amendment. For it must be borne in mind that there is nothing in the amendment, that can be construed to refer to State Courts. And we must also remember that federal laws must be enforced by and through the instrumentality of the federal judiciary.

Whatever legislation, therefore, may be necessary or proper, to extinguish slavery, or involuntary servitude, or to prevent restraint of, or interference with, personal liberty, is clearly within the power of Congress. And Congress may, very properly, regulate the mode of proceeding, the competency of witnesses, the nature and character of evidence to be admitted, and all other matters touching the trial of cases, or the administration of justice in the federal Courts, or before judicial officers of the United States. And for any illegal interference with

or restraint of personal liberty, Congress has power to provide an appropriate and speedy remedy, to be administered by the federal judiciary.

Every one knows, who is at all familiar with the subject, that the appellate jurisdiction of the United States, as at present exercised, is very comprehensive indeed. It extends to all cases arising under the constitution and the laws of the United States, or where the validity, or construction of the constitution, or a law of the United States, is drawn in question. And a case may be said to have arisen under the constitution, or a law of the United States, whenever its correct decision depends upon the true construction of either. And as Congress is imperatively required to vest the whole judicial power of the United States in a superior Court and such inferior Courts as it shall ordain and establish, it has power to provide for the exercise of the appellate jurisdiction in such form as may be deemed proper, the manner or mode of removal being mere form and not substance. It may be by writ of error, appeal, or removal on petition, or in such other form, as Congress may see fit to prescribe. But whether, under the appellate power, Congress, has made any provision, or can make any provision, for the removal of a case like this, are questions which we are not called upon to decide.

The constitution, and the laws of the United States, which shall be made in pursuance thereof, are the supreme law of the land, and as such, are binding on all the Judges of every State, any thing in the constitution or laws of any State, to the contrary notwithstanding. But the law to be binding, must be made in pursuance of the constitution; that is to say, it must be a constitutional law. An unconstitutional law, is a mere nullity.

The question presented here, is a naked question of power. The statute law of this State excludes negroes from being witnesses, except under certain circumstances. The civil rights bill of Congress, in effect, declares that they shall have a right to give evidence, in all cases in

which a white person is competent to testify; and it is contended that the act of Congress operates as a repeal of the statute law of this State which excludes them, and is binding on this Court. I do not think so. I think Congress had exceeded its power. I am therefore of opinion, that in so far as the civil rights bill assumes to compel, regulate, or control the admission of evidence in the Courts of this State, it is inoperative, unconstitutional and void.

The fact that the negro man called as a witness, was the person on whom the assault and battery had been committed, having come to the knowledge of the Court, the Chief Justice, remarked that his testimony was admissible under the rulings of the Court, on the ground of humanity and necessity, although there was a white witness present, and he referred to the case of the State against Whitaker. Mr. Comegys said he was not aware the rulings had gone to that extent; that if he had been, he should not have raised the question. The Chief Justice replied that the admissibility of negro testimony, was raised in the case of the State against Whitaker, for kidnapping, tried in Kent County in the year 1840, and also, in two other cases, one against Griffin, for kidnapping, and the other against Cooper, for an assault and battery. He stated that in those cases, competent white witnesses were present; that although in the cases of Whitaker and Griffin, the white persons present were participants in the crime, yet they were competent witnesses, and that in Whitaker's case an accomplice, named David Walton, was actually examined for the State; and yet the kidnapped negro boy, William Clarkson, was held to be a competent witness in the case; and that ever since those cases, it had been the practice of the Court, to allow the negro on whom the offense had been committed to testify.

Wooten, J., concurred with the Chief Justice, in regard to the civil rights bill, and also, as to the competency of the witness on the ground of humanity and necessity.

Wales, J., said he was unable to concur in the views of the Chief Justice, and was therefore compelled to dissent from the opinion of the majority of the Court on the constitutionality of the Civil Rights Act. He was inclined to believe that the act was valid, and this belief was strengthened by recent decisions on this question, some of which had been made by Judges of the United States Supreme Court. But perhaps, after fuller argument and consideration he might think differently. He agreed, however, that the witness should be admitted for the reasons stated by the Chief Justice.

THE STATE v. WILLIAM HAMILTON.

The defendant was indicted for a malicious injury in cutting the cotton warp on one hundred and twenty-six looms, of the value of one thousand dollars, in the cotton factory of Daniel Lamot, Jr., in Brandywine hundred, to the great damage of the said Daniel Lamot, Jr., and against the peace and dignity of the State. The Court *held* the alleged malicious injury to be an indictable offense under the laws of this State, which by necessary implication and construction makes a malicious injury done by one person to another, either in his person, or in his real or personal estate, a breach of the peace, and as such, an indictable misdemeanor in this State.

Court of General Sessions, &c., New Castle County, November Term, 1867. William Hamilton, the defendant was indicted for unlawfully, wantonly, willfully, maliciously and mischievously cutting the cotton warp on one hundred and twenty-six looms, alleged to be of the value of one thousand dollars, and of the goods and chattels of Daniel Lamot, Jr., to the great damage of the said Daniel Lamot, Jr., and against the peace and dignity of the State. Heard before Wootten and Houston, Justices; Gilpin, C. J., absent. The facts on which the indictment was found by the grand jury were as follows: Daniel Lamot, Jr., was the owner of a cotton factory in Brandywine hundred,

and on the morning of the 26th of June last discovered that some person during the preceding night had clandestinely entered the beaming room of the factory and cut one hundred and twenty-six cotton warps on the like number of beams and power looms in the room, and which had been so placed on them preparatory to commencing the process of weaving the warps that day, consisting of over thirteen thousand yards of warp, and worth at least forty cents per pound, and that the injury thereby done to the warp, and the damage thereby done to him would amount to as much as fifteen hundred dollars. The defendant had been in his employ as a hand in the factory, and in the beaming room in it, but he had been discharged from his service a few months before, and from the evidence before them the grand jury were satisfied that he had secretly and maliciously committed the act to injure and damage Lamot.

Grubb, for the defendant, now submitted a motion to quash the indictment because the alleged wrong and injury was not an indictable offense under the laws of this State, as we had never had any statute making malicious mischief an indictable offense, as they had in England and in some of the other States, and it was never indictable at common law, either in England or in this State, unless the commission of the mischief or injury was attended with an actual breach of the peace; for it was at common law nothing more than a mere trespass to private property, for which an indictment would no more lie at common law than it would for the breach of a contract. 1 *Bennett & Heard's Lead. Cr. Ca.* 21, 22. *Rex. v. Storr.* 3 *Burr.* 1698. *Rex. v. Atkins,* 3 *Burr.* 1706. *Rex. v. Bake et al.* 3 *Burr.* 1731. 2 *Bouv.* 9. 3 *Black. Com.* 214. 4 *Black. Com.* 5, note 5, 243. *Brown's Case,* 3 *Greenl. Rep.* 177. *Black's Case,* 2 *Md. Rep.* 376. *Smith's Case.* 1 *Cheeves Rep.* 157. *Phipp's Case,* 10 *Ire.* 19. *Wheeler's Case,* 3 *Ver.* 344. *Kilpatrick's Case,* 5 *Denio* 281. *Taylor's Case,* 6 *Humph.* 285. *Shelt's Case.* 6 *Humph.* 283.

Burrow's Case, 2 Halst. 426. Where the trespass or offense manifestly tends to a breach of the peace when it is committed, it is indictable at common law in this State, but not otherwise. *Chandler's Case*, 2 Harr. 553.

Moore, Attorney General. This is an indictment at common law, and a malicious injury to private property when grossly aggravated, is an indictable offense at common law, and had so been held and ruled in this State in the case of the *State v. Vodges*, which was for maliciously shooting into another's dwelling-house. Or where it manifestly tends to a breach of the peace. *Chandler's Case*, 2 Harr. 553. 2 Whart. Amer. Cr. Law, Secs. 2002, 2003. And what other tendency could such a malicious injury as this have, but inevitably to a breach of the peace when committed by one wholly irresponsible for the damage in a civil action? It was not every trespass, or even malicious injury or mischief to private property, that was indictable at common law he would admit; but when it was committed secretly in the night time, or was such as to inflict a peculiarly wanton and malicious injury on another in the damage or destruction of his property, it was indictable at common law as a misdemeanor. As, however, all the early and later acts of Parliament have made the offense in such cases a felony in England, the misdemeanor there has been merged in the felony by force of the statutes, and it was therefore no longer indictable otherwise than under the statutes. 3 Greenl. Rep. 177. 1 Bish. Cr. Law, Secs. 420, 421, 421 a. 2 Bish. Cr. Law, Secs. 831, 835, 839. J. Kel. 29. 6 Mod. 175. 2 Strange 1133. 1 Leach 12. 2 Arch. 708. *Loomis v. Edgerton*, 19 Wend., 419. *The People v. Smith*, 5 Cow. 258. *Feisher's Case*, 1 Dall. 335. *Eckert's Case*, 2 Brown 249. *Taylor's Case*, 5 Binn. 277. *Commonwealth v. Leach*, 1 Mass. 58. 1 Overt 305. 1 Wheel. Cr. Ca. 490. *Henderson's Case*, 8 Grattan. 2 Cranch 259. 2 Humph. 39. 9 Pick. 1. 3 Salk. 187. 13 Ire. 33.

Grubb replied.

Houston, J., announced the opinion of the Court overruling the motion to quash the indictment.

The question in this case has been well argued on both sides, and we regret that we have had not had more time to give to the consideration of it in the mean while, since this is the first time that it has ever been formally discussed and submitted for decision to a Court in this State, in the only way that could entitle it to the weight and authority of a precedent on the point to guide or control us in the practical solution and determination of it in the form in which it now comes before us. But with our present impressions in regard to it, and with the conflict of authorities before us which have been cited in the argument, we are not prepared to sustain the motion which has been submitted by the counsel for the defendant to quash the indictment. For we cannot but think after the best consideration which we have been enabled to give to the subject, that a wanton, malignant and malicious injury deliberately perpetrated by one person upon the property of another, is something more than a mere trespass in the ordinary acceptation of that term, and is, and ought to be, a public offense, and indictable as such by the law of this State. And we shall take occasion hereafter to assign our reasons for this conclusion in a more formal and considerate manner than is either convenient, or expedient perhaps, at the present time, in the mere matter of disposing of this motion. Among the authorities cited in the argument, *Bishop* and *Wharton* on criminal law and *Wheeler's Criminal Cases* so lay it down, while *Bennett & Heard's Leading Criminal Cases* and *Blackstone* in his *Commentaries* assert the contrary, that is to say, that it is not a public offense, nor indictable as such at common law, as the counsel for the defendant contends. But the discrepancy and conflict between these authorities, as well as that which appears in the multitude of American cases which have been cited in the argument, and are referred to by the text-writers, serve to show that it is, to say the least, still a vexed and unsettled question in this country.

But we apprehend that malicious mischief and injury to private property as a mere misdemeanor, and indictable and punishable as such, has received a wider and a more enlarged interpretation in this country than it has in England. In that country upwards of eighteen hundred sections, it is estimated, of acts running from the reign of Henry the Eighth down to the reign of George the Third, have been enacted for the special purpose of providing against malicious mischief and injury; and as such private wrongs and offenses were thereby originally made felony without benefit of clergy, and are still made felonies of a high degree, and the penalties thereby prescribed for them were more certain and specific than that of the common law, the books give but few examples of common law indictments for this class of offenses. But as these English statutes do not obtain in this country, malicious mischief, as a common law offense, has here been the subject of frequent adjudications. In its general application here it may be defined to be any malicious or mischievous injury, either to the rights of another, or to those of the public in general. The recent inclination, however, so far as the common law is concerned, is to restrict the party injured to his civil remedies, except (1.) where the offense is committed secretly in the night time, or in such a way as to inflict peculiarly wanton injury; or (2.) where it is marked by malignant cruelty to animals; or (3.) where it is accompanied with a breach of the peace, or it directly and manifestly tends to a breach of the peace, as being done in the presence of the party injured, to his terror, or against his will. 2 *Whart. Amer. Cr. Law*, Secs. 2002, 2003, 2004. And malice, either expressed or implied, is required to sustain the indictment. *Idem*, Sec. 2006.

But whether it is settled or not, that every mere trespass upon the private property, real or personal, of another originally constituted a breach of the peace, and therefore an indictable offense, or misdemeanor at common law, there can be no doubt of the fact that what-

ever act could amount to a breach of the peace at common law would be indictable as a criminal offense, and a misdemeanor, at least, at common law, for that was from time immemorial the acknowledged test and criterion by which the common law distinguished a public from a private wrong merely, and determined whether it was indictable as a common law offense or not; and it is certain that every breach of the peace was indictable at common law, because it immediately concerned the King, his crown and dignity, and because he was the grand conservator of the peace of his kingdom, and therefore the wrong which it constituted was against him and his sovereign authority, as well as against the subject, or private individual injured by it. And although the Court of King's Bench held as late as the time of Lord Mansfield in the case of *Rex. v. Storr*, 3 Burr. 1698, that the mere terms of *vi et armis* alleged in an indictment at common law for a forcible entry into real estate and turning the owner out of the possession of it, with nothing more, and without the words *et manu forti*, would not import that it was done with sufficient force to constitute a breach of the peace to render the act of mere trespass in that case an indictable misdemeanor, yet it does not, nor was it intended to reverse or impair the ancient and well established rule that wherever the act alleged in the indictment is so alleged as to constitute a breach of the peace, it is *prima facie* indictable as an offense at common law.

But admitting, as we may, that such a malignant and malicious and aggravated injury as we are considering in this case, would not now be indictable as a misdemeanor at common law in England, because under the later rulings and practice of the Courts there it would not have constituted a breach of the peace in contemplation of law, we will next consider and enquire if this can be the common law rule with us under the special statutory provisions which have long been in force in this State, and which seem to have an important bearing on the subject. We

allude to the provisions of *Sections 7 and 12 of Chapter 97 of the Revised Code, p. 331, and of Section 18 of Chapter 127 of the Revised Code, p. 475*, the first of which provides for binding to keep the peace persons who threaten to kill, or wound another, or to injure him in person, or estate, and the last of which provides that assaults, batteries, and nuisances, not specially provided for by statute, shall be deemed misdemeanors, and shall be punishable by fine and imprisonment, or either, according to the discretion of the Court. Sir William Blackstone with the characteristic partiality with which he contemplates and commends the superiority in his view of the laws and institutions of the realm of England generally, claims for it in his chapter on preventive justice, as contradistinguished from punitive justice, almost the sole honor among the governments of his day, of having by law any means of preventing the commission of crimes and misdemeanors. Now, it so happens that we have, and have had for a long time in this State, borrowed, doubtless, at an early date from the laws of England on the subject, a much more comprehensive and liberal statute for that purpose, than can be justly boasted of by any British subject in that country. The proceeding, however, in such cases is very much the same here as there, the jurisdiction and redress there being thus defined by him; after stating the authority of any justice of the peace there, *ex officio*, to bind all such persons to keep the peace as should in his presence commit the acts mentioned, he adds: "also wherever any private man hath just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him, or that he will procure others to do so, he may demand surety of the peace against such person; and every justice of the peace is bound to grant it, if he who makes it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also further swear that he

does not require such surety out of malice, or for mere vexation. This is called *swearing the peace* against another; and if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does." 4 *Blacks. Com.* 254, 255. And this security was taken by a recognizance before the justice entered into by the principal and his sureties, the main condition of which was that the principal should in the mean while keep the peace, and to appear at the next sessions, and to which it would be certified and returned by the justice. The causes for which such surety of the peace could be required are also stated by Hawkins to be, wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, or is threatened to be imprisoned by him. 1 *Hawk. Sects.* 6, 7, p. 254. And which are substantially as same as stated by Sir William Blackstone. And they were each of them acts which when committed would constitute a breach of the peace at common law, and therefore it was that this judicial proceeding to prevent the commission of these special offenses when justly apprehended by any one at the hands of another, was a proceeding to prevent a breach of the peace, and which, of course, it could not have been, unless the acts and wrongs it was intended to prevent when committed, should amount in law to breaches of the peace.

But as we have before remarked, the provisions of the statute of this State on the subject are much broader, and the causes for which security of the peace may be here required are very different from what they are in England, although in this State such security can only be demanded on threats actually made by the party against whom it is demanded, as provided for in the statute. And as we have seen, it is not only "whoever shall threaten to kill or wound another," is to be subject to such demand, but "whoever shall threaten to kill or wound another, or to injure him in person, or estate," shall on proof such

threats before a justice of the peace, be subjected to it under our statute, and shall be required to enter into recognizance with surety to be approved by such officer, conditioned for his appearance before the next Court of General sessions of the Peace and Jail Delivery, to be held in the county, there to answer such matters as shall be objected against him by the complainant, and in the mean time to keep the peace and be of good behavior towards all the people of this State, and especially towards the complainant, and not to depart the Court without leave thereof, as is provided for and prescribed in *7 Sec. of chapter 97, Rev. Code 331* before referred to, and which in that section is denominated in terms a binding to *keep the peace*, and which just as clearly imports a binding to *prevent a breach of the peace* by the execution of the threat to do the injury to the complainant in his person or estate, as alleged and set forth in his affidavit of complaint on which the proceeding was incepted. And accordingly, it has been long and uniformly held in the Court of General Sessions of the Peace and Jail Delivery, in which we are now sitting, that a threat by one person to injure another, either in his person, or in his estate, real or personal, is a threat to commit a breach of the peace under the provisions of this statute, and against which security to keep the peace may be demanded for the protection of the party threatened pursuant to the form prescribed in it. But every such threat is, of course, a threat to do the party threatened a malicious injury, and is also, of course, a threat to commit a breach of the peace under the effect and operation of the statute. And if so, has not the statute by necessary implication made every malicious injury done to another in his person or estate, even without any antecedent menace or threat to commit it, a breach of the peace in contemplation of law? For by what kind of legal magic or mystery could the statute make a threat to injure another in his person, or estate, a threat to commit a breach of the peace, without at the same time making indirectly and by necessary im-

plication, at least, every such malicious injury in the abstract a breach of the peace? Even the threat simply to commit such a malicious injury, because it is a threat under the statute to commit a breach of peace, is made a criminal act by it, first cognizable before a Justice of the Peace under his criminal jurisdiction, and then cognizable before this tribunal of general criminal jurisdiction below offenses made capital and the crime of manslaughter, and it has therefore, made such a threat even an inchoate misdemeanor.

And if such a malicious injury when committed without any threat preceding it, is made by the necessary implication and operation of the statute, a breach of the peace according to the technical import and effect of those terms at common law, no punishment for it, as such, being specially provided by statute, is it not to be deemed a misdemeanor and indictable at common law under which all breaches of the peace are indictable, unless it is otherwise provided by statute, pursuant to the meaning and intention of the 18 *Sec. of Chapter 127, Rev. Code 475*, before referred to, and which is as follows: "Assaults, batteries, nuisances, and all other offenses indictable at common law, and not specially provided for by statute, shall be deemed misdemeanors, and shall be punishable by fine and imprisonment, or either, according to the discretion of the Court?" Such at all events, are the conclusions of our minds on the questions here presented and considered.

The defendant was afterwards tried and convicted on the indictment at this term of the Court.

COURT OF OYER AND TERMINER.

THE STATE *v.* JESSE DRAPER.

Express malice aforethought, and malice aforethought implied by law and murder of the first and second degree under the statute, and manslaughter defined and distinguished.

One born deaf and dumb, and who has never received any education in the schools designed for mutes, or religious or moral instruction, will be criminally responsible for murder of either degree, or of manslaughter, as the case may be, if he has sufficient capacity, reason and intelligence to distinguish between right and wrong with reference to the act when he committed it, and knowledge and consciousness that it was criminal and would subject him to punishment and to understand the nature and consequences of it. But the law will not imply malice from the use of a knife by one afflicted with that natural infirmity and a violent temper when angry and excited, with which he furiously stabs and kills another who has suddenly assaulted and thrown him, and is about to whip him, unless there is evidence sufficient to satisfy the jury that he had provoked the assault for the purpose of stabbing the deceased with it.

On an indictment for murder against a person deaf and dumb from his birth, the killing by him being proved, the law will presume that he was criminally responsible for it, until the contrary appears.

Sussex County, April Term, 1868. At a Court of Oyer and Terminer held at this term, Jesse Draper, a deaf and dumb man, was indicted for the murder in the first degree of Nathaniel H. Dickerson. On his arraignment the Attorney General read the indictment aloud to him, and on the question being put to him, guilty or not guilty, his counsel, Mr. Cullen, responded for him, not guilty, and

thereupon the Court ordered the plea of not guilty to be entered upon the record. The evidence in the case was that the prisoner, who was a negro, about thirty years of age, and deaf and dumb from his birth, had been living for the last seven years in the family of the father of Nathaniel H. Dickerson, the deceased, working on the farm with the father and the deceased and another son, and had long evinced a strong and peculiar partiality for the whole family, and had never before manifested any disposition to injure any member of it, or fear of any of them, except the deceased, who was the only member of it capable of mastering him, and who had sometimes had occasion to conquer and chastise him, when in his violent and angry moods actual force was required to overpower and subdue him.

On the evening of the 9th of November preceding, the father and the deceased, his brother and the prisoner had been in Georgetown, and on their return together to the farm a few miles from town, and soon after leaving it, the deceased, who had been following on foot some distance behind the cart drawn by a yoke of oxen, in which the deceased, his father and brother were riding, came up and got in and sat down at the tail of it, when the deceased, who was seated on the side of it and driving the oxen, ordered him by signs which he well understood, to get out and walk, because the oxen were tired, and it increased too much the weight in the cart at that end of it, to which he paid no attention, but on the repetition of it he got out in a very angry mood and made a great deal of noise, muttering and mumbling as he walked nearly a half mile by the side of the cart, the violence of his anger and passion increasing as he proceeded, until finally he went round the cart and up to the side of it on which the deceased was sitting, and shook his fists violently at him, when the latter threw off his coat, sprang out of the cart, and both at the same time seizing hold of each other the deceased threw him on the ground, and was on top of him, when after some delay, the cart and oxen still pro-

ceeding onward with them, the father and brother got out and went back to the spot to separate them, and where they found them lying side by side on the ground, the deceased badly cut with a knife on the left side of his neck and who died of the wounds in a few minutes afterwards. It was then between the hours of nine and ten o'clock at night, and on reaching home and examining his body it was found to be cut and stabbed in fifteen different places with a sharp pocket-knife by the prisoner, as it was afterwards ascertained, the immediate cause of his speedy death consisting of the cut first discovered in the left side of the neck, three inches in length and two in depth, and which completely severed both the jugular vein and artery. When first seen by the father, after the deceased jumped out of the cart, they were striking at each other, they then ran together, clung hold of each other, and the deceased threw him on the ground, falling on top of him; and when arrested, as he was that night, there was a lump on the forehead of the prisoner, just above the left eye, which had the appearance of having been made by a recent and severe blow with a fist.

It further appeared in evidence that the prisoner was a strong and athletic man, whom but few were able to overpower in a trial of strength or personal conflict, and although he and the deceased had several times fallen out, and the deceased had always before overpowered and whipped him in such conflicts, he had never seriously hurt him, and they were in general on very good and friendly terms with each other. And although the prisoner had never been able to speak or hear, and had never received any instruction or education in the alphabet or language of signs taught in the schools of mutes, he had signs of his own by which he could readily communicate his ideas to and converse with such persons as were familiarly acquainted with him, on many ordinary matters and things, and was possessed of a good deal of intelligence and mechanical ingenuity, and was not only a good hand and workman on a farm, but could make well any article

he tried to make that was required upon it, and knew the boundaries of it and of the adjoining tracts in the woods better than the owner of it, and knew the difference in the value of our national silver coins, as well as our smaller bank notes, and could be sent to the stores in town to buy many ordinary articles required on the farm or in the family; and although he had never received any religious instruction, he seemed to have some conception of a future state of rewards and punishment, and to believe that there is a heaven above for the good and a hell beneath for the bad, indicating by appropriate signs that those who shout at religious meetings will go to the former, while the bad would descend to the latter. He also in like manner could make known that he knew the public jail and the whipping post and pillory, and what they were for in Georgetown, and that people who stole were there whipped and imprisoned for it. His previous character had been good, and though evidently conscious of what he had done, he made no effort to escape or attempt to deny it, but seemed apparently to exult over it. To a witness who knew him very well, and soon after saw him passing on the road that night with a good deal of blood on his clothes, and who by signs enquired of him the cause of it, he replied by signs which he understood that he had had a fight with a man and had cut his throat and killed him, and that it was the man with whom he knew he had had a fight not a great while before, by which he knew he meant the deceased, whom he also knew very well; and that the prisoner was very angry when he first came up to him on the road, and seemed to grow more so while communicating this intelligence to him. It was further proved that the prisoner had purchased the knife with which the cutting and killing of the deceased was done, some time prior to that, at a store in Georgetown, and that he was seen sharpening it on a grindstone two days before, and that on that night before they left Georgetown the prisoner showed it to another witness, and how sharp it was, and then flourished it around in his

hand as if cutting with it, but what more if anything further he meant by it, he could not say.

Moore, Attorney General. The evidence showed that the prisoner, though he had been deaf and dumb from his birth, had sufficient reason and intelligence to distinguish between right and wrong in reference to this horrible act, and to restrain the passion and the impulse which led to the commission of it, and to know that it was wrong in the sight both of God and man; and that he was, therefore, criminally responsible for it, and could and should be convicted and punished for it under the indictment. That the evidence was strong and sufficient to prove to the satisfaction of the jury that it was prompted by malice which had long before been growing and increasing in rancor and intensity against the deceased, until it burst in all its fury upon him on that fatal night of the 9th of November last, and that the prisoner had not only coolly and deliberately premeditated such a deadly attack upon him, but had deliberately prepared for it by purchasing and sharpening the knife with which he perpetrated it and that thus actuated by malice he **was** prompt to avail himself of that occasion by his own unreasonable violence and insults to provoke a fight with the deceased, in order that he might, now that he was thus prepared for it, fully gratify it. And if that was the case, then it was conclusive evidence that it was committed with express malice aforethought, and was murder of the first degree, as such a weapon so used as it was by him, was certain to produce death. 1 *Russ. on Crimes*, 482. 1 *Hale*, 452. But if such evidence of antecedent malice or malevolence against the deceased were wanting, as the prisoner was the aggressor, and the fight which followed was evidently a provocation of his own seeking, for the purpose of killing or cutting and stabbing the deceased with the knife with which he was then prepared, it would be evidence at least of implied malice, and could not possibly extenuate and reduce the crime below murder of the second de-

gree. 1 *Russ. on Crimes*, 521, 585. *Ros. Cr. Ev.* 684. 1 *East. P. C.* 244, 245.

Cullen, for the prisoner. Assuming for the sake of argument that the prisoner was in contemplation of law a sane man and criminally responsible for the act, the offense could not amount to murder of either degree, but to manslaughter only. But it did not amount even to that offense, because the prisoner having been deaf and dumb from his birth, and wholly without any religious, moral or any other kind of formal instruction or education, he was both in fact and in law an insane person, and was therefore not criminally responsible for the act. The law regarded such a deaf and dumb person as *non compos mentis*, and as much so as an idiot. 1 *Black. Com.* 304. 1 *Russ. on Crimes*, 6. *Rev. Code*, chap. 133, sec. 15. *Ros. Cr. Ev.* 224. 4 *Black. Com.* 324. 1 *Mass.* 103. 32 *E. C. L. R.* 517. 4 *Denio* 9. 13 *Mass.* 299. 1 *Beck's Med. Juris.* 858. *Shelf. on Lun.* 2 *Law Lib.* 2, 289. *Constitution of the State*, Art. 1, Sec. 7.

There was not sufficient, if, indeed, there was any evidence before the jury, to satisfy them that the prisoner had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing; or sufficient knowledge, moral sense and consciousness to know that the act he was doing was wrong and criminal, and would subject him to punishment. On the contrary, the evidence from the beginning to the end of it, clearly showed that he had not; and if so, then he was not, and could not be criminally responsible for it. 2 *Greenl. Ev. Sec.* 372, and foot note to the same. 1 *Beck's Med. Juris.* 764. 7 *Met.* 500. 38 *E. C. L. R.* 208. 3 *Harr.* 512. On that point all the witnesses who know him best, had testified that it would even now be impossible to make him understand the difference between right and wrong in general, and particularly in an abstract sense, or between right and wrong as to the act committed by him, or that he is criminally liable, and is now being tried

for it, and that, even his life may at this moment be depending upon the issue of it. He has not heard a word that has been said since the trial commenced, and still knows and understands nothing as to the object and import of it.

Moore, Attorney General. By the law as now settled on that early question in regard to them, deaf and dumb persons are not necessarily and absolutely responsible for crime by reason of that natural infirmity, but it is incumbent upon the prosecution to prove that such a person when indicted for a crime has some degree of intelligence. *Whart. & Stille, Sec. 140. Whart. Sec. 532. Beck's Med. Juris. 765. Rev. Code 491. Sec. 15.*

The Court, Gilpin, C. J., charged the jury. The questions presented in the case, and which it would be their duty to consider and determine on the evidence before them were, whether the prisoner was criminally responsible for killing Nathaniel H. Dickerson, the deceased, on the night of the 9th of November last, in the manner and under the circumstances proved, and about which there was no dispute, inasmuch as it was also proved, and not disputed, that the prisoner was, and had been from his birth, a deaf and dumb person, without any instruction or training in any school for the education of mutes, and if so responsible, then to what extent was he here criminally responsible for it on this indictment, which is for murder with express malice aforethought, and of the first degree under the statute.

He then proceeded to define the crime of murder with express malice aforethought, and read from 1 *Russ. on Crimes*, the definition of it, as follows: Express malice is when a person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some

bodily harm. And this malice must be aforethought, and this sedate, deliberate mind and formed design to kill or to do some great bodily harm to the person slain, as thus evidenced and shown by external circumstances, must be formed and exist in the mind of the slayer before the mortal blow is given or the act or harm done to the body of the slain which causes the death, is committed. And when such is the case, and such is the evidence, it is murder of the first degree under the statute. But the crime of murder may also be committed at common law and under the statute without express malice aforethought, but with what is known and defined in law as implied malice aforethought, and which is implied by law from any deliberate, cruel act committed by one against another, however sudden, which causes his death, as where one person kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. 1 *Russ. on Crimes*, 482, 483. And in such a case the killing will be murder of the second degree under the statute. It has, however, been contended by the counsel for the prisoner, conceding for the sake of argument that he can be held criminally responsible for the act, that the killing in this case can in no event be considered, under all the circumstances proved, as amounting to more than the crime of manslaughter, which is by the same authority defined to be whenever death ensues from a sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity, and the offense will be manslaughter; but no words however offensive they may be, nor even a blow with the fist, will be sufficient to free the party killing from the guilt of murder, if upon such provocation a deadly weapon be made use of, or an intention to kill, or to do the party some great bodily harm was otherwise manifested, nor will even a blow be considered a sufficient provocation to extenuate the crime and reduce it to man-

slaughter where the revenge is disproportioned to the injury inflicted by it, and is outrageous and barbarous in its nature, if malice aforethought express or implied is proved to have existed in either of such cases. 1 *Russ. on Crimes*, 580, 581.

According to the testimony of James Dickerson, the brother of the deceased, the evidence on this point was substantially to the following effect: He and his father and brother, Nathaniel H. Dickerson, and the prisoner were together in this place, and started home to the farm of his father a few miles from here that evening with the cart and oxen, his father, brother and himself in the cart and the prisoner following on foot some distance behind it, but who overtook them not far from town, and got into the tail of the cart, when his brother, the deceased, who was seated on the side of the cart and driving, told him by signs which he understood, to get out and walk, because his weight made the cart too heavy behind, and the oxen were tired and were getting along very slow before he got into it, and that the prisoner at first did not do it, but on his brother's telling him again soon afterwards to get out and walk, he got out very angry and walked along the side of the road and the cart about half a mile making a good deal of noise muttering and mumbling in his angry way to provoke his brother to attack him, and growing madder and madder (to use the language of the witness) as he proceeded, he passed to the other side of the road and that of the cart on which his brother was then seated and shook his fists violently at him, when his brother instantly threw off his coat, sprang out of the cart at him, and after striking a few blows at each other, they clung and his brother threw him on the ground falling on top of him. Not apprehending anything serious as likely to occur from it, they did not immediately stop the oxen and get out of the cart and go back to separate them, but after a while they did so, and when they reached the place where they fell they found them both lying on the ground side by side, and his brother cut in the neck

as described more particularly by the physician who made the examination of the body, and other numerous cuts and stabs received by him in the combat, and that when they separated them and the prisoner left the place he was very angry, and was making a great deal of noise and exulting apparently in what he had done. And if the jury were satisfied from the testimony of the brother and father of the deceased that such were the facts of the case which immediately preceded, accompanied and concluded the mutual combat between the parties, and that the prisoner sought and provoked the combat for the purpose and with the intention of using his knife and killing or severely wounding the deceased with it in the fight, then we must say to the jury that if they should be further satisfied from all the evidence which they had heard in the case that the prisoner at the time when he inflicted these knife-wounds on the body of the deceased, had capacity and reason sufficient to enable him to distinguish between right and wrong as to those acts, and had a knowledge and consciousness that the act he was doing was wrong and criminal, and would subject him to punishment, and to understand the nature and consequences of it, and to know that it was wrong and criminal, his offense would be, in contemplation of law, murder with express malice aforethought, and of the first degree under the statute. 2 *Greenl. Ev. Sec.* 372. But if the jury should not be satisfied from the evidence that the prisoner sought and provoked the fight with the deceased for the purpose and with the intention before mentioned, and only bethought himself of the pocket knife he was then daily carrying in his pocket, and determined to use it against the prisoner after the fight had begun and in a sudden and violent transport of anger and passion produced by the combat, and so used it without any such previous design or intention, the offense would amount to manslaughter only, provided the jury should also at the same time be further satisfied from all the evidence which they had heard in the case that the prisoner had

sufficient capacity and reason to distinguish between right and wrong as to the act itself, and knowledge to understand that it was wrong and criminal and would subject him to punishment as before stated. For there could be no doubt on the proof upon that point that having been already greatly exasperated and incensed by the order of the deceased to get out of the cart and walk while he and his father and brother remained in it, he must have been still more infuriated with anger and passion when the deceased, unfortunately for himself, with more rashness than prudence or legal justification, sprang out of the cart and commenced the fight with him, on his merely shaking his fists violently at him in it, particularly, when we consider the peculiar and natural infirmity with which the prisoner was unfortunately afflicted. They must have both been very angry at that moment, and the mutual blows which followed could have but increased the rage of such a person as the prisoner unfortunately appears to have been; and therefore, unless the jury should be satisfied from all the evidence before them in the case that the prisoner possessed sufficient capacity and reason to be criminally responsible as before stated, and was actuated by antecedent malice and malignity against the deceased, and with a preconceived design provoked him to attack him on the occasion for the purpose of gratifying that malice and malignity by cutting and stabbing him with the pocket knife with which he was then provided and prepared for that purpose, no malice could be implied by law from the facts and circumstances proved in the case, and the transport of passion and heat of blood in which it was suddenly done in the fight between them, would extenuate and reduce the commission of the act to the crime of manslaughter.

In all cases of alleged crime, the crime alleged having been proved to have been committed by the accused, it is the general rule that he is presumed to have been at the time sane or of sound mind, and to have had a sufficient degree of reason to be criminally responsi-

ble for it, until the contrary has been proved to the satisfaction of the jury. But this rule of law does not apply to a deaf and dumb person when charged with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such a case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was wrong and criminal, and would subject him to punishment; and this the State was bound to prove in this case in regard to the capacity and reason, knowledge and understanding of the prisoner at the bar to the satisfaction of the jury, or it would be their duty to acquit him. And owing to this legal presumption in his favor, the prisoner would be entitled to the benefit of any reasonable doubt which the jury might have on that subject. He would also be entitled to the benefit of any reasonable doubt which they might have as to the act having been committed by him with express malice aforethought, as before explained and defined, if they should be clearly of the opinion after carefully and maturely considering all the evidence in the case that he was criminally responsible, and in that event he could not be properly convicted of any crime greater than manslaughter.

The verdict of the jury was, not guilty by reason of insanity, or want of criminal responsibility.

STATE v. ROBERT H. GOLDSBOROUGH.

Murder with express malice aforethought at common law is murder of the first degree under the statute.

Circumstantial evidence is receivable both in civil and criminal cases; and the necessity of admitting it in criminal matters, is even greater than in civil matters, and it is adopted the more readily in propor-

tion to the difficulty of proving the fact by direct evidence, and because of the ease with which it can be disproved by the proof of other facts inconsistent with it. But to warrant a conviction it must be entirely satisfactory, and of such significance, consistency and force, as to produce conviction in the minds of the jury of the guilt of the accused beyond a reasonable doubt.

But the rule in regard to reasonable doubt in criminal trials, requires that the jury shall be satisfied of the guilt of the accused to a moral certainty, not to an absolute certainty.

Sussex County, October Term, 1869. At a Court of Oyer and Terminer held at this term, Robert H. Goldsborough who had been indicted at the preceding term, was tried for the murder of Charles Marsh of the first degree, on the 10th day of December 1868 in Lewes and Rehoboth hundred. The evidence in the case consisted of the following facts and circumstances. The deceased was a bachelor residing on his farm near the ocean in the hundred mentioned, with a nephew of his named William H. Burton, the tenant of it, and the prisoner who since the month of September preceding had constituted the only members of the family. The latter, however, was away a few days almost every week, and was only there when he had nothing to do elsewhere, without paying for his board or receiving wages as a hand on the farm. Two of the witnesses who had gone there from Georgetown on a gunning excursion for the next day in the neighborhood, to spend the night on the 9th of December, the day preceding the murder, found no one at home on their arrival there about 9 o'clock that night, but the deceased returned about 1 o'clock. The two arose early the next morning and went gunning before breakfast, leaving the deceased alone in the house, but on their return for breakfast they found the prisoner there and also the deceased. After breakfast between 8 and 9 o'clock they went out gunning again in the direction of the shore, and invited both the deceased and the prisoner to go gunning with them, which they both declined, the deceased saying he

had to go to Lewes, and the prisoner that he had some work to do, but that he would be at the house when they came back to dinner from gunning, and would have dinner ready for them; but when they returned for it between half past 1 and 2 o'clock they found no one there. Somebody had fed their horse in the stable, however, for he was not done eating his corn when they got back for dinner; and when they got up on the sand hills on coming back from the beach for dinner one of them saw some person driving off from the house a yoke of oxen and a cart with a hogshead in it, but could not see where it went, and did not see it again.

Another witness who lived about a mile from the deceased's farm in a south west direction, as he was walking over to the house of the latter that morning, saw him and the prisoner coming up from the beach towards the house, and when about a hundred yards from them, the prisoner called to him and asked him what he wanted. At the first and also the second enquiry from him, he did not answer, but when he had got near enough he told him he had come for the chisel which he had lent him. The three then went on together to the house, and the prisoner told him where he would find it in the house, and soon after he had got it, the three started back from the house together down towards the branch, leaving no body at the house; but the prisoner said to him as they started that way together that the other way was his nearest way back to his home, to which he replied that he thought that was his nearest way and proceeded on with them in the direction of the branch, it was but a narrow path leading from the house of the deceased towards and around the branch, and they walked in single file, the deceased ahead, himself next and the prisoner behind them, they had not proceeded far, however, when the deceased stooped down and picked up a turtle gig and grubbing hoe lying by the side of the path, and then the prisoner stopped, stooped down and picked up a double barrelled gun also lying by the side of the path, and which he iden-

tified as the same which was then produced and submitted to his inspection on the trial. They then proceeded on in the same order down the path towards the branch, the deceased carrying the gig and hoe, and the prisoner the gun, until they reached a point where it diverged from the direction of the branch towards his own house, when he turned up it in that direction from the deceased and the prisoner, while they proceeded straight on still towards the branch in the same order, the prisoner about four yards behind the deceased when he parted from them. When he had got about a half mile from them towards his home, he heard a loud report of a gun fire off, but he could not say from what direction. It was about 9 o'clock that morning when he left his home to go over there. The deceased had on a black soft felt or wool hat. He did not see the prisoner again until about 12 o'clock that day, and he was then walking very fast near his house going up the neck with a black pair of pants under his arm and a pair of boots in his hand, and called to him, but he made him no answer. He next saw him on the Monday night following at a neighbor's house two miles from that of the deceased, and the prisoner then said to him that Charles Marsh must be dead, and should be looked for. The witness and another had that day looked for him around the pond and branch in the direction in which the deceased and the prisoner were going when he parted from them on the day of the disappearance of the deceased, without finding him; but he renewed the search with three others, relations of the deceased, and a brother of the witness early the next morning, and went round the branch and pond and found his dead body lying as if it had fallen forward to the ground, breast downward and with the wounded side of the head and face turned upward, the left hand under it and the right arm and hand extended from it on the ground. The gun shown him was lying on one side of it upon the ground about ten or twelve inches from it, with one barrel discharged and the other still loaded; a turtle gig was also lying on the ground by the side of it, but

there was no grubbing hoe there, nor has the one he was carrying that morning ever been found there or elsewhere. There were also one picee and some smaller fragments of a black, soft felt hat, and the lining of it lying near his head, and a dark cloth cap uninjured lying some foot and a half from it, and in his pocket a wallet or purse with \$15 in it, also powder in a horn and shot in his pocket in a shot-bag. About one-third of his head was gone and had been shot and blown away. On the Monday night before spoken of the prisoner told the witness that the last he saw of the deceased, he went to his house and took a drink and went off on the day he disappeared. He next saw the prisoner the morning after the body of the deceased had been discovered, and when he told him that he heard a gun fired not long after he had parted from him and the deceased on his way back home on the day the deceased disappeared, he replied that he heard no gun and was so busy plastering at the deceased's house that day, and there were so many guns fired about there, that if there had been a thousand fired that morning he would not have heard one of them. On the morning after deceased's body was found, the prisoner told him that after he left him and Marsh at the branch they went round the pond to a persimmon tree and dug some holes, and that he left Marsh there, and then went back to the house.

Wm. J. Burton, the nephew and tenant of the deceased, testified that he left his house on Tuesday, the 8th of December, and went to his mother's in that neighborhood to superintend the slaughtering of her hogs, and returned on the following Saturday, and that he left the prisoner there when he went away with his uncle, and he was the only person then left with him. He had been staying there since the 21st of September preceding, and had done some plastering in the house, but none that he could discover since the preceding Monday. That when he came there he told him he had five dollars, and that it was all the money he had, and that the witness knew that his uncle had received about two weeks before the murder

\$485 in paper money which he carried in his pocket folded up in brown paper, and he recognized and identified the little old pocket-book or wallet found in the pocket of the deceased after his death, with \$15 in it, as the property of his uncle, and which he had seen only a few days before in a trunk in one of the lower rooms of his house, and had seen the prisoner in that room only the day before he left there to go to his mother's; but the wallet had only a few cents in it when he last saw it; and that on the same day his uncle was talking in the presence of the prisoner of going to Philadelphia to buy some clothes and carpets for his house, and when he requested him to delay it until his return from his mother's, where he was going the next day. He also identified the cloth cap found and picked up near the head and body of the deceased, as belonging to his uncle, and which he had some time before found on the sea-shore, but had not seen him wear it but once that fall; it was kept hanging on a nail in the kitchen. In October the prisoner had asked him what his uncle did with his money, and he knew that he had received the \$485 spoken of before, about two weeks previous to the murder. He next saw the prisoner at his mother's about sunset on Thursday, the 10th day of December, and he there requested him to send his clothes to him from his uncle's house, and said he would not be back there any more; he enquired of him how his uncle was, and he said he had taken his gun that morning and gone down on the bank muskrattling.

Another witness testified that he was at Andrew J. Marsh's on Thursday, the 10th day of December, and about 11 o'clock that morning, the prisoner came up there from the direction of the deceased's farm, and wanted to borrow an augur and said he was going to make a ladder, and asked Marsh to go with him to the deceased's place and help him make it, but he was killing his hogs and told him he could not go. He said the deceased had taken his gig and gun and gone off, he did not know where.

Andrew J. Marsh testified, that on that day he was

killing hogs, and between half-past 10 and 11 o'clock the prisoner came to his house, and wanted an augur to make a ladder, and asked him to go and help him, but he told him he could not. He said the deceased had gone off with his gig and gun, and when invited by him to remain for dinner, he said he could not stay, that some gunners were to be at the deceased's house for dinner, and he had to go back and get it for them. He did not remain more than twenty minutes, and left about 11 o'clock.

Lemuel W. Marsh testified that the prisoner was at his house, two miles and a half from the deceased's farm, at 12 o'clock on Thursday, the 10th of December, and when he came he took a seat in the kitchen door, which was open. He seemed very warm, and there were large drops of perspiration on his face and forehead, although the day was quite cold. Witness's wife requested him on that account to shut the door, when the prisoner said, "For God's sake, don't shut the door! I am sweating like a horse, and if I haven't come since I left Charles Marsh's in a horse gait, shoot me!" While he was there the witness's brother came up with a cart and oxen, and asked the prisoner to go back with him to Charles Marsh's; he said "No, Thomas, I have overstayed my time, and ought to be at Catherine Burton's now." She was a sister of the deceased. And the wife of the preceding witness also testified that when the prisoner came up and took a seat in the kitchen door, he threw down a pair of pants and said, "there were more gunners down at Charles Marsh's;" when she asked if Charles was not tired of gunners, he said he did not know, but Charles had gone away with his gun, he did not know where, before he got there, and he then said he was done at Charles Marsh's, and ought to have been at Catherine Burton's before that time.

Catherine W. Futchter testified, that the prisoner stopped for a few moments at their house about half-past 12 o'clock on Thursday, the 10th of December, and she invited him to come in and take a seat, but he said he had not time, that he was on his way to Mrs. Catherine Bur-

ton's, and had waited at Charles Marsh's for him to come home, until he could wait no longer, and was now behind time to do a half day's work that afternoon at Mrs. Burton's.

Charles W. Burton, a boy, testified that he was at his mother's, Catherine Burton's, Friday morning, the day after the deceased disappeared; the prisoner was there, and said he must have some whiskey, and taking a five dollar note out of his pocket, said it was the last money he had, and he hated to break it, but he must have some whiskey, and gave it to him to ride up to a store in the neck and buy him a quart, which he did, and when he brought it to him with the change, he gave him twenty-five cents out of it. He drank very often, and wanted another quart by noon that day, which he got for him in the afternoon, and another the next morning, which he also got for him.

Lemuel M. Burton testified that he went with the prisoner from his mother's, Catherine Burton's, after dinner on Saturday, the 12th day of December, down to the prisoner's father's, and while there he saw him take a roll of bank notes from his pocket, and extending his hand towards his father, and with the ends of the notes projecting and plainly visible beyond his fingers and thumb, heard him say to him, "Pa, will you take a chew of tobacco?" And to which he replied, merely, "None of your nonsense, Bob." And that on the Monday following they were again at his mother's, and his sister was weeping over the strange disappearance of their uncle, and said she feared he was dead, when the prisoner replied that there was not a bit of doubt in his soul that he was dead, and that his body ought to be searched for, and when found he would be found dead in the woods along the branch, with his gig and gun beside him, and then added, "didn't I tell you, Penn, Charles Marsh would shoot himself with that gun, that the right barrel was easy on the trigger?"

Joseph W. Hudson testified that the prisoner was at his house in that neighborhood, on Tuesday morning after the disappearance of the deceased, and several other persons were also there, but no one had alluded to it before the prisoner remarked "that is a great go about Charles Marsh!" Witness asked what was it? He replied that he was missing. He then said that Charles and he went musk-ratting on Thursday morning, and when they got to a little glade round the branch, Charles told him to go back and finish plastering the kitchen, and took the gun, grubbing hoe and gig, and that he had not seen him since they then parted, that Charles went on and he went back to the house, finished the plastering and then left. The witness then asked him if he might not have gone to some of his neighbors, and he replied that he did not think he would go to any of them dressed as he then was. He then said he had no doubt he had shot himself; and he also said that Charles had near five hundred dollars about him that morning.

The physicians who saw and examined the body soon after it had been found, before the coroner's inquest, testified that the death had been produced by a gun shot wound in the head, and that the load of shot had entered the back part of it, passed through the skull and came out at the right eye or a little above it. All the right side of the top of the skull had been carried or blown away by it, the right hemisphere of the large brain was gone, also the right eye was entirely blown to pieces, the bones of the nose were all there, but torn loose, the right cheek bone was also loose, the right ear was also torn and blown to pieces, and the back of the neck and hair were blackened and singed as by exploding gun powder. It would seem that the load must have entered and come out in a body, and the muzzle of the gun could not have been but a short distance from the back of the head when the load of powder and shot was discharged from it. The wound was mortal and death must have ensued instantly, almost. There was also an oblique fracture of the skull across the

centre of it in the direction of the left eye technically termed a depressed fracture, which could not have been produced as the other wounds and fractures were, and which they thought might have been produced by a blow upon it with the stock of the double barrelled gun which was found by the side of the dead body with the breech of it broken.

Several of the witnesses also testified that they found the foot prints of two persons in the ground where the soil was light and loose enough to receive them, proceeding to within one hundred and fifty yards where the body was found and in that direction, and which could not be traced any further because of the nature and hardness of the ground from that point to where it was lying, and that they were near about in the same line, as of two persons walking one after the other, and not by the side of each other; that one pair of them was considerably larger than the other, and when they were afterwards severally measured with the boots which the deceased, and also with those which the prisoner wore on the morning of the murder, those of the deceased not only fitted in length and breadth with the larger pair, but even corresponded in the impression which a patch on the sole of one of them had made in the tracks, while those of the prisoner as closely fitted the smaller tracks. There was also a line of the smaller footprints starting from the direction in which the body lay and proceeding towards the house.

Bates, Deputy Attorney General, reviewed the evidence very fully and contended that it was absolutely conclusive against the prisoner, and that he was clearly guilty of murder of the first degree under the statute.

Wright, (*W. Saulsbury* with him,) contended that the evidence was purely circumstantial, and when such was the case in a trial for murder, every circumstance relied on to establish it, must be as clearly and satisfactorily proved, as if the whole case solely depended upon it, for

there should be no imperfect or defective link in such a chain of testimony when relied on for such a purpose. It must also be consistent throughout the entire length of it with every other fact or circumstance proved in the case, even to the most minute extent. It was essential too, that the circumstances should be of the most conclusive character. Preponderance of proof had no application in criminal prosecutions, although the rule was otherwise in civil cases; and such evidence should to a moral certainty actually exclude every other hypothesis than the one proposed to be established by it. 1 *Stark. Ev.* 540, 572, 577. No malice in the ordinary sense of that term, had ever been ascribed by any one to the prisoner, as a motive for murdering the deceased, and the only motive that had ever been, even by way of hypothesis purely, imputed to him for the commission of the alleged crime, was the sum of about five hundred dollars which the deceased had received some two weeks prior to his death, and which it is supposed and assumed, but not proved by any witness, that he had about his person at that time. The prisoner on his arrest had been searched for it, but none of it had been found on him, while a wallet containing fifteen dollars was in a pocket of the deceased when his dead body was found. That alleged fact and the assumed motive based upon it, constituted the most vitally important circumstance in the case, according to the theory and hypothesis of the prosecution, but had it been as clearly and conclusively proved to the satisfaction of the jury, as both law and reason required in such a case? But conceding for the sake of argument, that the deceased had been carrying that amount of money about his person wherever he went and in whatever manner he was dressed for two weeks, others were aware of the fact as well as the prisoner, and therefore such a motive could not be hypothetically imputed to him alone for the commission of the crime, and no one under the evidence in the case could conclude that it could not possibly have been committed by another; and without such a

moral certainty that the prisoner committed the act, the jury would not be justified, either in law or conscience in convicting him.

Lore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury, that the death of Charles Marsh, for the murder of whom the prisoner is indicted, had been established by the evidence, and that it was produced by a gun shot wound in the back part of the head and neck which was scorched and discolored with the exploded powder, and the nature, extent and fatal effect of which had also been clearly established in the evidence; but whether the gun was charged with leaden shot, or other deadly substance which produced it, was not material in the case. When a man comes to his death in such a manner the law does not presume that it was by his own hand, or by accident, either, but by violence at the hand of some other person; and hence it becomes the duty of the coroner of the county to institute an official investigation into the cause of it, and to arrest and commit the perpetrator of it, if ascertained, and the evidence in his judgment shall warrant it, in order that he may be tried for it before a Court and jury, and the law vindicated, if on indictment and a full and fair trial he be found guilty of the offense.

In the course of the testimony the jury had learned all the facts and circumstances from the sworn witnesses examined in the case, on which the State relies for the conviction of the prisoner of the crime with which he is charged in the indictment, and which is the murder of Charles Marsh on the 10th day of December last in Lewes and Rehoboth hundred in this county, with express malice aforethought, and of the first degree under the statute. And in order that you may understand the meaning and import of these terms in contemplation of law, we say to you that express malice aforethought is when one person kills another with a sedate, deliberate mind and formed

design, such formed design being evidenced by external circumstances discovering the inward intention, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. These however, are but some of the instances given for the sake of examples or illustrations in which the external or attending circumstances will evidence the sedate, deliberate mind and formed design to kill, or to do the party killed some bodily harm, for whenever in any other case the attending circumstances evidence such a mind and design to do the act, and death ensues, it constitutes in law express malice aforethought, and murder of the first degree under the statute, and is punishable with death; as where one, either from motives of hatred or revenge, or with a view to rob him of his money or get possession of any other thing about his person, coolly and deliberately forms the design in his mind to kill another, or wound and disable him for that purpose, and commits the act, either by lying in wait for him, or in any other manner, and his death ensues as the consequence of such bodily injury, it is likewise murder with express malice aforethought, and of the first degree under the statute. There is no direct evidence in the case that the prisoner killed the deceased, and if he is guilty of killing him, there has been no fact or circumstance proved in the case that requires of us to define or describe the crime of murder of the second degree under the statute, or any other grade of felonious homicide under it. On the contrary, all the evidence in it is what is called circumstantial evidence exclusively.

But circumstantial, or presumptive evidence is receivable in both civil and criminal cases. The affairs and business of the world could not well be carried on without recognizing the admissibility of this description of evidence. In criminal matters the necessity of admitting it is indeed much more manifest, than in civil matters. Crime usually seeks secrecy; and the possibility of proving the offense charged by direct or positive evidence, is

much more rare and difficult in criminal cases than in civil cases. Circumstantial or presumptive evidence is, where some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its having actually occurred. It is the inference of a fact from other facts proved; and the facts thus inferred and assented to by the mind, is said to be presumed, that is to say, it is taken for granted, until the contrary be proved. And this is what is called circumstantial or presumptive evidence; and it is adopted the more readily, in proportion to the difficulty of proving the fact by direct evidence, and the obvious ease with which it can be disproved, or with which other facts can be proved, which are inconsistent with it, if it never really occurred.

In capital felonies, such as murder, where the proof is of a circumstantial character, it is quite usual for the counsel to declaim against circumstantial evidence, and to denounce and reprobate conviction, founded upon such evidence; and yet, the universal experience of those engaged in the administration of justice, shows the absolute necessity of admitting it, and of relying on it, in forming our conclusions in regard to the guilt or innocence of the accused persons. Indeed, if Courts of Justice, were to exclude circumstantial evidence, the great majority of criminals would escape the just penalty of their crimes. They would go unwhipped of justice, and be turned loose upon the community to commit other crimes. But whilst I say this, I also say to you, most emphatically that circumstantial evidence, to warrant a conviction, must be entirely satisfactory, and of such significance, consistency, and force, as to produce conviction in the minds of the jury, of the guilt of the accused, beyond a reasonable doubt. The great rule on the subject is this; that where the evidence is circumstantial, the jury must be fully satisfied, not only that those circumstances are consistent with the prisoner's having committed the act

charged as constituting the crime, but they must also be fully satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the prisoner was the party. They must be such as to exclude any other hypothesis or conclusion.

The facts and circumstances proved in the case with the legitimate inferences resulting from them, and on which the State relies for the conviction of the prisoner in manner and form as he stands indicted, were all now before the jury, and by that evidence alone was the question of his guilt or innocence to be determined by them. But there is a marked distinction between civil and criminal cases in respect to the degree or quantity of evidence necessary to justify a jury in finding their verdict for the State. In civil cases their duty is to weigh the evidence carefully, and to find for the party in whose favor it preponderates, although it may not be free from reasonable doubt. But in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule of criminal law that the guilt of the accused must be fully proved; and neither a preponderance of evidence, nor any weight of preponderating evidence is sufficient, unless it produces full belief of the fact to the exclusion of all reasonable doubt in the mind of the jury. But that does not import in contemplation of law a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which after entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot feel any abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent of the offense charged until he is proved to be guilty. If upon such proof there is reasonable doubt remaining, the

accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

The verdict was guilty of murder of the first degree.

THE STATE v. JOSHUA JONES AND LEWIS CARPENTER.

On an indictment and trial against two for a rape, one as a principal and the other as accessory to the commission of it, the voluntary confession of the latter formally taken by the committing magistrate as required by the statute, is admissible in evidence just as it is drawn against him on their joint trial, but after its admission the Court will specially instruct the jury that it is not evidence against the other prisoner.

New Castle County, November Term, 1869. At a Court of Oyer and Terminer held at this term, Joshua Jones and Lewis Carpenter (negroes) were indicted, each as principal and each as accessory in separate counts, and tried for a rape committed on a white married woman, named Mary Meredith, on the 17th of September preceding. She and her husband and their two children were living at the time with Mr. Henry McCrone, on his farm, but she and her children, who were quite small, were left alone in the house about ten o'clock that evening, both her husband and Mr. McCrone being absent for the night, which was known to the prisoners, both of whom had been at

work there during the day. She had retired to bed with her children in the room above the kitchen, leaving the door of the kitchen unfastened, and a lamp lighted in it for Mr. McCrone on his return, and another in the room above on retiring to bed with her children, and was awakened between 11 and 12 o'clock by the presence of a colored man in the room and on her bed, the lamps then being extinguished both in her bed-room and the kitchen below, but she made such a strenuous resistance against his efforts to force her, and such an outcry, that he desisted for a time, and left the room and went down stairs, but after a time he came up again into her room, and while she yet had the lamp in her hand and was groping about for a match to relight it, he seized her round the body, and after struggling all she could to prevent it, and crying and begging him to let her go, he threw her down on the floor, and by choking her until she became unconscious, he accomplished his purpose, and when she recovered her consciousness, and was aroused by the crying of both her children, he was gone. She then fled with them in great haste, fright and distress, about 12 o'clock, to the nearest neighbor's house, where she at once made known the occasion of it, and what had happened to her, and who in their testimony confirmed her statement as the same as was then made to them, except that she did not then say she had been ravished.

William Moore, another negro man, was sworn, and testified that he went with Lewis Carpenter that evening from Mr. McCrone's farm to Mr. Morrison's, and as they went back Joshua Jones joined them, and as they went along Joshua asked Lew. if Meredith was at home; Lew. said he was not, and he then said, let's have some devilment to-night—let's go over and ravish old Mary Meredith, and Lew. agreed to it, and said he would hold her if he would ravish her, to which Joshua replied, he would do it. They all three then went on to the house of Mr. McCrone, and Josh. and Lew. went into the yard, where he stopped and remained, and then into the kitchen

where they put out the light, then up stairs to the room above it where they put out the light there too. Josh. then got on the bed where she and her children were lying asleep, but soon one of them waked up and commenced crying, and they came down again, and they all went together to the barn yard, where Josh. said that was a d—d pretty way to help a man! and then said, let's go back again and do it before she gets the lamps re-lighted; and they then went back again, he remaining at the yard gate, and that the prisoners then re-entered the kitchen and went up stairs as before, and were gone about a quarter of an hour, and when they came back to him he asked Josh. if he had had connection with her, and he said he had.

The constable who arrested the prisoners and conveyed them to jail on the commitment of the magistrate, testified that on their way Joshua Jones asked him when they would hang him, to which he replied that he could not inform him, but added, "You admit, then, that you did it?" to which he answered, "I might as well, the way things have gone;" and that Lewis Carpenter then said to him, "Yes, Joshua, you know that you did it," to which he replied that he was sorry that he had not done always as his mother had told him; if he had, that would not have happened.

The Attorney General, after the formal proof of it, then offered in evidence the voluntary confession of Lewis Carpenter, taken before the justice of the peace, and reduced to writing and read over by him to the prisoner and approved and signed by him, admitting his participation in the transaction, and stating that the rape was committed on Mary Meredith by Joshua Jones, and not by him, in substantial conformity with the facts stated in the foregoing testimony of the witness.

Whitely, for the prisoners. Where a crime is committed by two or more joint offenders, and an admission or confession made by one constitutes a part of the *res gestæ*,

it is admissible in evidence against all of them, or only when it is in itself an act, or accompanies and explains the criminal act for which the others are responsible; but not when they are in the nature of a narrative, description, or subsequent admission or confession. Besides, in this case, the confession of Carpenter offered in evidence, is admissible against him only by virtue of the statutory provisions expressly, and because it was reduced to writing and read over to him by the magistrate, and was duly approved and signed by him in his presence, and which therefore could have no such sanction, validity or effect against Jones, the other prisoner. *Greenl. Ev. Sec. 233. Regina v. Blake, 6 Ad. & El. 126 N. S.*

Lore, Attorney General. It is admissible in evidence, at least, against Carpenter, who formally made it, in this case, and must go to the jury just as he made it, although the Court will instruct them that it is not evidence against Jones, the other prisoner. 2 *Stark. Ev.* 39. 1 *Phil. Ev.* 414. 19 *E. C. L. R.* 351.

Whiteley, in reply, cited *Arch.* 408, 409.

The Court remarked that the better and settled practice now is to admit the confession in such a case just as it is made in evidence against the prisoner, but to specially instruct the jury, as they should in this case, that it is evidence only against the prisoner, Carpenter, but not evidence against the prisoner, Jones.

Verdict, "Guilty against both of them."

STATE v. EDWARD DARNELL.

On a trial for murder of the first degree the voluntary confession of it made by the prisoner, before his arrest, to a person having no authority over him, who said to him out of the hearing of any other, that he must know something about the killing of the deceased, and if he would tell him all about it, he would say nothing about it to any one, and upon which the prisoner then stated to him how he and another person killed him, held to be admissible in evidence.

Kent County, April Term, 1870. At a Court of Oyer and Terminer held at this term, Edward Darnell, *alias* Edward Young, a negro boy about fifteen years of age, was indicted and tried for the murder of Thomas Hogan of the first degree, on the 19th day of March preceding. The deceased lived in Philadelphia and was in the habit of visiting this State once or twice a year as a foot-peddler vending lamps and buying old brass, pewter and muskrats skins, and was but slightly known in the neighborhood in which the murder was committed, and without being missed by any one in the mean while, his dead body was accidentally found lying on the 26th day of that month in Kersey's Millpond, near the margin of it in a retired spot where it was set in pine trees and briar bushes, and near an old worm fence which extended down to it between the place and the public road leading over the dam and not far from it, and where the water was not more than a foot deep in the pond; and on the same day before it had been removed from the water, a physician had been summoned and was present to make an examination of the body, who testified that he found near a small pine bush traces of blood on the ground, and from that point in a direct line to the edge of the pond where the body was lying was, by measurement, about ninety-six feet. The back of the body was very much rubbed and scratched, and which might have been produced by the dragging of it on the ground from that point down to the edge of the pond. There was a gash cutting through the

scalp three inches in length on the left and back part of the head, and another about two inches long also on the left side of it, and the left ear was very badly mashed. There was, however, no fracture of the skull, and the only wounds which he found upon it, and which he had just described, could not, he thought, have produced death, but they were sufficient to paralyze and render him insensible for a time, and if in that condition the body was dragged down to the pond and into the water sufficiently deep for the purpose, the person would soon drown; and in his opinion drowning in that condition was the immediate cause of his death.

Samuel T. Moore testified that he was on the same day at the coroner's inquest on the body; that the prisoner was also there, and that he had a conversation with him when no other person was within hearing of what they said. That he said to the prisoner he must know something about the killing of the deceased, and if he would tell him all about it, he would say nothing about it to any one.

Lofland, for the prisoner, objected to the admissibility of any admission of confession made by the prisoner to the witness under such a promise, and cited the case of the *State v. Bostic*, 4 Harr. 563.

Lore, Attorney General. The witness had no power or control over him, and although the statement might have been confidential, it was entirely optional and voluntary on the part of the prisoner, and it was against the sound rule and policy of the law, and the due administration of criminal justice, to allow the lips of an important witness to be sealed before a Court and jury for such a reason, or by such an assurance.

The Court overruled the objection. It appears the declaration was voluntarily made to one who had no power or authority whatever over the prisoner, and without any

threat, promise or inducement which could exclude it from going in evidence. *Gilpin, C. J.*, remarked that he relied on the rule as stated in 1 *Greenl. Ev. Sec.* 229, upon this point, and distinguished it from the case of the *State v. Bostic*, 4 *Harr.* 563, because in that case the witness stood in the commanding and authoritative relation of mistress to the accused, and because the promise and inducement made and held out by her to the accused in that case were much stronger than in this.

The witness stated that he then asked the prisoner if he had ever seen that man (the deceased) before, he said he had, and that on that Saturday, the 19th of March, he and Bill Lowber came to his uncle's, John Young's, where he then was, and that Lowber took him to one side and told him the old man had money, and if he would help him kill him, he would give him some of it, and that when he left there they went with him into the thicket and pines across the road and long the millpond under the pretence of showing him the way to a house around there where he could buy some muskrat skins, and as they got over the fence into the pines, Lowber took a fence rail and knocked him down with it, and that they then drug his body into the millpond and left it there, sunk in the water, but Lowber did not give him any of the money, although he promised him he would at another time.

William H. Sard testified that on the day of the coroner's inquest the prisoner voluntarily said to him, he would like to tell all he knew about the killing of the old man. He then said that he was that morning cutting wood at Sally Ann Morris's when the old man and Bill Lowber came there together, and while the old man was in the house, Bill Lowber came round behind the house to him where he was cutting wood, and said to him that the old man had money, and if he would help him kill him, he would give him some of it, and that when the peddler left there and started over the mill dam they followed after him, and that when he went into the woods around the pond they followed him, and there Bill Lowber took

a fence stake and knocked him in the head with it, and then they pulled his body down to the pond and pushed it into it.

The Court, Gilpin, C. J., charged the jury, that the prisoner, it would seem, did not deny his participation and complicity in the killing of the deceased, and his only object seemed to be to show that another was engaged with him in it, and first suggested it to him, who dealt the fatal blow according to his statement, and that he was more guilty than himself in the perpetration of the crime which he thus confesses; but it was enough if he was merely present and in any way aiding and assisting the other in the commission of it, to constitute him a principal in it, and as guilty of it in the eye of the law, as the person whom he alleges was the principal both in the conception and the execution of it, if what he has stated was true in regard to him.

Verdict—Guilty of murder of the first degree.

THE STATE v. WILLIAM LOWBER.

Although the testimony of a witness who has been convicted of murder of the first degree, but has not yet been sentenced for it by the Court, is admissible on the part of the State, under the statute in such case made and provided, on the trial of another person separately indicted and tried at the same term for the same murder, yet, if it is uncorroborated by the testimony of any other witness in the case, the Court will leave it, as the statute does, to the jury to judge of the credibility and weight of it with the taint of his conviction attaching to it. But if the credibility of it is further weakened and impaired by contradictory declarations made by him in regard to the prisoner's participation in the murder, before his own trial, and and also by contradictory testimony of other witnesses in the case, the Court will advise the jury that they ought not to convict the prisoner on his testimony alone.

At the same time as in the preceding case, and at the same Court of Oyer and Terminer, William Lowber.

negro, was also separately indicted and tried for the murder of Thomas Hogan, of the first degree, on the same day and year aforesaid.

Lore, Attorney General, before the trial commenced, presented his petition to the Court for a writ of *habeas corpus ad testificandum* to the Sheriff of the County, for the production in Court of Edward Darnell, *alias* Edward Young, negro, who had been tried and convicted, but not yet sentenced, at the same term and was now in prison in the gaol of the county for the murder of the same person, as a witness for the State in the case, upon which the Court directed, as is usual, the issuing of the writ to be noted by the clerk on the record, and the Sheriff to produce the prisoner in the Court as a witness. On his examination he stated that he was at his aunt Sally Ann Morris's, near Kersey's mill, on the day the peddler was killed, and the old man and Bill Lowber came there that morning from Fredericka, between 8 and 9 o'clock. The peddler took out a soldier's overcoat and asked him if he would buy it, he did not, but his aunt Sally Ann Morris bought a lamp which he also took out and asked her to buy. He and Bill were not there long, not a half an hour. After they had left she sent him to tell the peddler that he had not given her the right change, and to send it to her by him; he overtook him at his uncle John Young's bars as he was going in there, and told him he had not given her the right change, but he said he had, and he followed him in there. Bill Lowber was there and went round behind the house, and called him to him, and said to him that man has money and he was going to have it, and if he would go with him and help to rob him and say nothing about it, he would give him some of it; but the peddler had left there before Bill Lowber called him out behind the house and said that to him. It was about 9 o'clock when he left there; that they talked about robbing him while they were in his uncle John Young's yard, and again on the mill dam to which they followed him, while the

peddler was ahead of them and they were together following him. From there the peddler went across the field up to the house of Phillis Lewis, and they waited in the road until he came out from there, and they then went from there just behind him to the mill dam, and from there Bill went up with the peddler to Mrs. Wootter's house and he went up into the pines by the side of the pond and waited for them near a half an hour, when they came there. Was there when Cæsar Beauchamp passed along the path which there lies through the pines, and he had been there more than half an hour when he came along. The peddler was then easing himself in the edge of the pines, and he was standing in the path, but Bill Lowber to avoid being seen by Beauchamp, stepped out of his sight into some pine bushes and pretended to be making water; that it was then about half past 10 o'clock, and was not quite a half an hour after that time when they got to the place where they killed him and drug his body into the pond, and that it was after 10 o'clock when they killed him, and which he now described substantially as it was represented by him in his admissions proved on the trial in the preceding case against him.

On cross-examination, however, he admitted that he had told Mr. J. Stewart that it was himself, and not Bill Lowber, who went with the peddler up to Mrs. Wootter's house that morning, and also that he had told Mr. John Jester that it was not Bill Lowber, but Jim West and himself who killed the peddler.

Henry Whitaker testified that he lived and kept store near Frederica on the road to Kersey's mill, and about 8 o'clock in the morning of the 19th of last March, Thomas Hogan, the peddler, came into his store and enquired where John Young lived, and a short time before he came in he saw a negro man whom he took to be William Lowber, pass his store walking in the direction of Kersey's mill. That he gave him the information asked for and in a very few moments he left, and having occasion soon after-

wards to step out of the store himself, he looked up the road and saw them going up the road, but Lowber a little ahead of Hogan.

Alexander Young testified that he was at work that morning putting up a fence along the road about a hundred yards beyond Mr. Whitaker's store and saw the prisoner pass up the road, and afterwards the peddler about a half a mile behind him, and that it was about 8 o'clock when the latter passed him.

James McQueen testified that he lived this side of Fredericka, and that the deceased spent the night before he was killed at his house, and left it the next morning between 6 and 7 o'clock, and he saw him again that morning between 8 and 9 o'clock going towards Kersey's mill, and that the prisoner was then with him, and they were walking along the road together side and side, that he stopped and talked with the deceased for a few moments, when the prisoner kept on for a short distance, and then stopped in the road and waited for the deceased, and that they were then a mile beyond Mr. Whitaker's store towards Kersey's mill.

Sarah Ann Morris testified that she lives on the road from Fredericka to Kersey's mill, a mile and a half from the former and a half mile from the latter place. On the morning of the 19th of March last William Lowber and the peddler came up the road together as far as her house between 8 and 9 o'clock, and the peddler stopped and came in, the prisoner did not, but kept on up the road. Edward Darnell was then there, and the peddler showed a soldier's coat to him and wished to sell it to him, but did not, she however bought some articles of him, and he gave her the right change all to five cents. Soon afterwards the peddler went away from her house alone and up the road towards Kersey's mill, and after a bit stepping out of the house and looking up the road, she saw him going into Kersey's

house, but saw the prisoner nowhere then or again that day. Soon after that Edward Darnell left her house and went up the road in the same direction and towards his uncle John Young's house, and was away until about twenty-five minutes of 12 o'clock, when he came back and ate his breakfast. Jim West was at her house at that time and took a dinner from there to a man who was working out in the woods some distance from her house, at twenty-five minutes before twelve o'clock and that Jim West was cutting wood at her house when the peddler came there, and was about there all that morning. She did not know why Edward Darnell went after the peddler from her house. She did not send him after the peddler for any thing. He was no relation of hers, but her mother had raised him, and he had been living at her house since last June, and Jim West boarded there all last winter. Two other colored women who were at her house during the period of that day spoken of by her, confirmed her statements, one of whom testified that the peddler came there a few minutes after the clock had struck eight that morning.

Thomas J. Young, a negro boy nine years old, testified that he lived at John Young's his grandfather's, on the road from Fredericka to Kersey's mill, and not far from the mill, and that it was the third house on the road from Sally Ann Morris' going towards the mill. That he saw the peddler at their house about 10 o'clock that morning, he saw him come along the road and stop there and saw William Lowber about the same time pass by their house on the road, but he did not stop, but kept right on, and soon after that Edward Darnell came to their house, but William Lowber was not with the peddler or Edward Darnell, or at their house when either of them came there.

Margaret A. E. Benning testified that she lives at Kersey's mill, and lived there on the 19th of last March, and saw the peddler at their house that morning, and it then wanted five minutes of 10 o'clock, and soon after he left

there and she went into the house, she saw two colored persons whom she did not then know, but whom she now recognized and identified as William Lowber and Edward Darnell, pass along the road in the same direction, and not far behind him, and when she last saw them the peddler was passing over the bridge of the dam and they were not more than fifty yards behind him. She was not more than five steps from the road when they walked past, and as they came towards her she could see their faces distinctly.

Matilda Wootters testified that she lived at the end of Kersey's mill dam and next neighbor to the preceding witness. The peddler came to their house that morning about 10 o'clock she supposed, and first inquired if she had any lamps like the one he held in his hand that she wanted to sell, she told him she had not, and he then enquired if they had any muskrat skins to sell, and she answered no. He had left his pack and satchel at the yard gate when he came through it, and as soon as he left the house she stepped to one of the front windows and then saw a negro man whom she did not know, but now recognizes and identifies as the prisoner, standing outside of the gate waiting for him, they then went away from there together up the road towards her father's house, and about fifteen minutes afterwards she saw the same two men coming from the pine patch and across his field towards the Canterbury road. The colored man had on a soldier's light blue overcoat, and which she also identified as the same which the prisoner then had on. Two other women who were then at the house of the witness in their testimony corroborated her statement and stated further that it was then about 10 o'clock in the morning when the peddler came there; but both of them on cross-examination admitted that they were witnesses for the State in the hearing of the prisoner's case on the writ of *habeas corpus* before Judge Houston, and that they were not then able to identify him.

James Wilkins testified that he saw the peddler that morning and a tall colored man with a heavy beard and mustache, between 9 and 10 o'clock, on the road together near Sally Ann Morris', and now recognized and identified the colored man as the prisoner.

Samuel W. Darby, the first witness called on behalf of the prisoner, testified that he saw him going into the town of Frederica about 6 o'clock in the morning of the 19th of March last, and William E. Knowles of the same place, that he sold him as early as 7 o'clock that morning, a dose of medicine on a prescription which he brought from Dr. Cahall, and Robert Parkinson that he saw him going into Frederica about 6 o'clock and afterwards going out of it about half-past 7 o'clock that morning; that he was at his shop when he saw him pass it going out and spoke to him, and that his shop is a mile and a half from Sally Ann Morris' house, and Samuel Townsend that he met him on the road that morning between half-past 7 and 8 o'clock about a mile from Fredericka going towards Kersey's mill, and the peddler about a half a mile behind him going in the same direction. Henry Carter testified that he saw the peddler going into John Young's house that morning about half-past 9 o'clock, and Edward Darnell also going in there a few steps behind him, but he did not see any body else, and he saw them again on his way back from the mill about fifteen minutes afterwards, the peddler within an eighth of a mile of the mill, and Darnell about seventy-five yards behind him, James H. Beauchamp testified that he met the peddler that morning between 9 and 10 o'clock, on Kersey's mill dam about midway of it, and about two hundred yards from Mrs. Benning's house, and a colored man with him whom he did not know; but he knew William Lowber very well, and it was not him. Cæsar Beauchamp also testified that between half-past 10 and 11 o'clock that morning he was going along the path through the pines near where the body was found in the mill pond, and saw the peddler

buttoning up his clothes a short distance from it in the pines and Edward Darnell standing in the path not far from him; but he did not see William Lowber, or any other person near there. He knew it was as late as half-past 10 o'clock when he left his house to go to the mill that way. It was also proved by various witnesses that it was a mile and a half from the place of the murder to the prisoner's house, and not less than seven miles from there to the town of Lebanon by way of his house, and that he was at his home at half-past 9 o'clock and geared and hitched his horses to his wagon and drove off on the road leading towards Lebanon, and was there by about 11 o'clock that morning. He also proved by several of the most respectable citizens residing in that section of the county, that his character for peace and good order had always been remarkably good for a man of his race, and void of all suspicion whatever until this accusation had been brought against him.

*The Court, Gilpin, C. J., charged the jury, that the prisoner was to be presumed to be innocent of the charge until his guilt had been proved and established by competent and credible testimony to the satisfaction of the jury beyond a reasonable doubt. The factum or corpus of the crime, that is to say, the killing of Thomas Hogan as alleged in the indictment against the prisoner, was supported by the testimony of one witness only, Edward Darnell, who had himself been convicted at the present term of the Court of the crime of murdering him, and upon his confession that he was an accomplice and participated in the murder of him. He was admitted as a competent witness on behalf of the State, and against the prisoner in this case on the special application of the Attorney General for a writ of *habeas corpus ad testificandum* to the sheriff of the county, for the production of him out of the common jail, in which he then was, and still is, imprisoned after his conviction of the crime, awaiting the sentence of the Court upon it, as a witness for the*

State in this case, and under the provision of the act of the General Assembly entitled "An Act in reference to to the competency of certain persons as witnesses," passed at Dover, February 18, 1859, which is as follows: "Sec. 3. That no person shall be excluded from testifying as a witness by reason of his having been convicted of a felony, but evidence of the fact may be given to affect his credibility." *Del. Laws.* 11 vol. 686; but which while it removed any exclusion which might then without the statute have prevented him from being a witness in the case, still leaves the fact of his conviction to affect his credibility as such, and which leaves the jury to judge of the weight and worth of his testimony with such a taint cast upon it. But in addition to this inherent defect in the character and credibility of it, his testimony against the prisoner was still further weakened and impaired by the contradictory declarations and statements made by him before his trial, and which he admitted on his cross-examination as a witness in this case, he had made to Mr. J. Stewart, that it was he himself, and not Bill Lowber, the prisoner, who went with Hogan, the peddler, up to Mrs. Wootters' house, and which he made at another time to Mr. John Jester, that it was not Bill Lowber, but Jim West and himself who killed the peddler. His testimony was also further weakened and impaired in its weight and credibility, by the inconsistent and contradictory testimony of other witnesses on several material and important points which would readily occur to the jury when they come to consider and compare them with his testimony, as well as by the fact which clearly appeared from the testimony of others that the prisoner could not have been at or near the place of the murder at the time when it was committed that morning. So far then as it connects the prisoner with the commission of it, his testimony not only stands alone without any direct evidence from any other witness to corroborate or support it, but it is, on the contrary, directly contradicted by his own declarations made after his arrest and before his trial, and

by the testimony of other witnesses in several very important particulars. The Court therefore in accordance with the general practice in relation to the testimony of accomplices in cases of murder and other felonies, would advise the jury that they ought not to convict the prisoner on the testimony of the witness, Edward Darnell alone, without corroboration to satisfy them beyond any reasonable doubt that the prisoner was a *particeps criminis* with him in the perpetration of the crime alleged, or that the prisoner participated with him in the killing of Thomas Hogan, as sworn to by him, notwithstanding the fact that he had himself already been tried and convicted of the crime of murdering him before he was admitted to testify as a witness in this case, for by his own statement he appeared and was produced and testified here as an alleged accomplice with the prisoner in the commission of the crime, although his credibility for that reason may not be affected to the same degree, as it might have been, if he had been called as an accomplice to testify in this case prior to his trial and conviction for the murder of the deceased.

Independent of his testimony the evidence in the case is entirely circumstantial, and in which there were marked discrepancies in the statements of the witnesses as to the time of day when the prisoner was last seen that morning in company with the deceased, or with him nearest to the place where the murder was committed, and which was a matter of great importance in the consideration of the case, as he was proved to have reached his home, a considerable distance from there, before the murder could have been committed according to the testimony of some of the most intelligent and reliable witnesses who had testified on such points in the case. But there is a marked distinction and difference between circumstantial evidence in civil and in criminal cases at law. In civil cases it is not necessary that the minds of the jurors shall be free from all doubt as to its sufficiency to prove the fact or matter in dispute, for it is their duty in such cases to

decide in favor of the party in whose favor the weight of such evidence preponderates, and according to the reasonable probability of its truth; on the contrary, in criminal cases the jurors are required to be satisfied beyond any reasonable doubt, of the guilt of the accused, or it is their duty to acquit him, the charge not being proved by that higher degree of evidence which the law in such cases demands. In civil cases it is sufficient, if the evidence on the whole agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other presumable hypothesis but that of the guilt of the accused. Because in criminal cases, and particularly in a prosecution for a capital crime, the law presumes the accused to be innocent, or not guilty of it, until the commission of the act by him has been proved by the evidence to the satisfaction of the jury beyond a reasonable doubt.

Verdict "not guilty."

Lore, Attorney General,

Draper, for the prisoner.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

STATE v. CHARLES LEE.

In an indictment for burglary in the dwelling-house of a father, and stealing therefrom sundry articles, consisting of ornaments merely, and not necessities, belonging to a minor and unmarried daughter then living in the house with him and his family, the property in them should be laid in the daughter, and not in the father.

Court of General Sessions, &c., New Castle County, November Term, 1870. Charles Lee was indicted and tried for burglary, in breaking and entering in the night-time the dwelling-house of William P. Cresson, with intent to steal his goods and chattels and money therein, and then and there one gold hunting-case watch, of the value of one hundred dollars, one pair of black onyx ear-rings, of the value of six dollars, one pair of black onyx sleeve-buttons, of the value of six dollars, two gold thimbles, each of the value of five dollars, three silver napkin rings, each of the value of two dollars, one ivory-tipped pencil, of the value of five dollars, one gold stud, of the value of two dollars, one pair of long gold and black enameled ear-rings, of the value of fifteen dollars, one pair of gold and black enameled sleeve-buttons, of the value of ten dollars, and one small pearl-handled pen-knife, of the value of one dollar, of the goods and chattels of the said William P. Cresson, in the said dwelling-house then and there being found, he did then and there feloniously and burglariously steal, take and carry away, &c.

The evidence was that he broke and entered in the night time the dwelling-house of the said William P. Cresson, and stole therefrom one gold hunting case watch, two gold thimbles, and one small pearl-handled pen-knife, the property of a daughter of Mr. Cresson, a young lady of about nineteen years of age, unmarried, and then residing in the house with him and his family. The only witnesses were her father and mother, and both of them proved that all the articles stolen, as well as the above which had been recovered, produced and identified by them, belonged to their daughter.

J. H. Rodney, for the prisoner, asked the Court to charge the jury that, as the property in the articles stolen was alleged in the indictment to have been in Mr. Cresson, and the evidence was that they were the property of Miss Cresson, his daughter, and were ornaments merely, and not necessities, the property in them should have been laid in her, notwithstanding she was a minor and unmarried, and residing in the house with her father and his family at the time; the prisoner could not be lawfully convicted upon the indictment.

Bates, Deputy Attorney General. Although ornaments, and not necessities, as they belonged by courtesy rather than by law, to a minor and an unmarried daughter then living in the family, and under the authority of her father, it was more correct to allege the property in him, although it might have been laid in either the father or daughter, under the circumstances proved.

The Court, Gilpin, C. J., charged the jury, That as the articles stolen were mere ornaments, and not necessities, and belonged, not to the father, but to the daughter, they could not, under the facts and circumstances proved, properly convict the prisoner on the indictment; and he was acquitted.

COURT OF OYER AND TERMINER.

STATE v. SAMUEL TOWNSEND.

In case of a fight between two persons, nothing short of imminent peril to his life or person from the other, can justify or excuse the one in killing the other, even if the other was the aggressor and assailant; and without that in no such case can the homicide fall below the grade of manslaughter.

Kent County, April Term, 1871. At a Court of Oyer and Terminer held at this term, Samuel Townsend, a negro boy, sixteen or seventeen years of age, was indicted and tried for the murder of Peter Young, a negro boy some older and larger than he, of the first degree, in the town of Frederica, on the night of the 24th of December preceding. There were two counts in the indictment, the first charging him with having committed it by hitting him on the left side of the head with a brickbat, and the other by having hit him with a black-jack loaded with lead. They had been fighting, and had been separated by a third person, soon after which the prisoner was seen to cross over to the side of the street on which the deceased was standing, and passing round behind and to the left side of him, and when two or three feet from him was seen to strike him with something on the left side of his head, and knocked him down. The prisoner soon after said to the witness, it was a brickbat, but it was too dark for the witness to see what it was he struck him with, but the blow produced a dull, heavy sound, and a cut and bruise through the skin of the temple about two inches in length. The deceased soon recovered his feet and remained moving about the town for some time after-

wards without suffering any serious pain or inconvenience from the blow, apparently, and his mother testified that when he came home that night his head was hurt and bloody, and she washed the wound in cold water the next morning, and did the same every day during the week. At first it ran blood only and all the time, but towards the end of the week it began to run white and watery matter, and on Saturday night just one week after he had received the blow, he came home crying and said his head ached as if it would burst. Sunday he became unconscious, and lingered until the following Wednesday, when he died. The *post mortem* examination on the Coroner's inquest, disclosed that the wound was on the left side of the head, back and above the temple, and was bruised and contused and somewhat ragged on its edges, that the skull was fractured an inch and three-quarters in length, and a portion of the skull was slightly depressed by it, and the brain and other matter was suppurating from it. The inflammation which ensued was the cause of his death. The physician further stated that he would hardly have thought that it could have been made by a brickbat, and that he saw the prisoner in the fall preceding at work making a black-jack or billet out of a piece of whip and a piece of lead weighing as much as a quarter of a pound; and the fracture might have been more readily made with such an implement. It might also possibly have been made by the deceased's falling when knocked down, with the side of his head against a sharp edge of a stone, or some other hard substance.

Draper, for the prisoner, contended that the only evidence was that the blow was struck with a piece of a brick hastily picked up by the prisoner in the street in the sudden heat of blood consequent on the affray or fight which he had just had with the deceased, and that it was not a deadly weapon, or of such a class of dangerous instruments as would imply malice in such a use of it on such an

occasion, and that under the circumstances it could, even in its worst aspect for the prisoner, amount to no more than manslaughter. But it was quite as probable that the injury was produced by the fall of the deceased on some sharp, hard substance in the street, and if so, the prisoner could not be convicted even of manslaughter; and asked the Court to so instruct the jury.

Lore, Attorney General. In consideration of the age of the prisoner, and all the facts and circumstances proved in the case, he would not contend for a verdict of guilty of murder of either of the first or of the second degree, but there was no evidence whatever that the deceased had been hurt, much less that his skull had been fractured, by his fall when he was suddenly knocked down by the prisoner on the street, for there was a well-proved, patent and palpable cause for it, with whatever weapon or instrument it may have been done by him. He would, therefore, confidently insist that it was clearly on the proof a case of manslaughter.

The Court, Gilpin, C. J., charged the jury. The Attorney General has conceded that this is not a case of murder of either degree, but contends that it is nevertheless a case of manslaughter, which is the lowest grade of felonious homicide, and if it is not that, then the prisoner must be acquitted under the indictment. Nothing short of imminent peril to his life or person can justify or excuse one person in killing another, even though they are fighting together at the time, and the other is the aggressor and the assailant in it; and in every such case in which the killing is done without the necessity of doing it in order to save his own life, or his own person from great and impending injury from the other party at the time, it cannot amount in law to less than manslaughter, and in no case to excusable or justifiable homicide.

But as the Court has been asked to charge you by the counsel for the prisoner, on another point presented by him in the case, the Court will say to you that if the de-

ceased's skull was fractured, not by a blow of some kind inflicted by the prisoner, but by his falling after he was struck by him, with his head against a stone or some other hard substance in the street, and there is sufficient evidence to satisfy the jury that such was the case, then the prisoner could not be convicted of manslaughter or any other offense under the indictment, because it does not so allege the killing, but in a wholly different and in a much more direct manner. Or, if the fatal blow was given in any other method, or in other way substantially and essentially different from those alleged in the indictment, and the jury should entertain a reasonable doubt on that point, or of the guilt of the prisoner in manner and form as he stands indicted, he was entitled to the benefit of it, and should be acquitted.

Verdict "Not guilty."

THE STATE *v.* STEPHEN H. COSTEN.

If one person shoots another with a deliberate intent to kill and kills him, it will be murder with express malice, and of the first degree under the statute; but if he only intended to disable him by shooting his arm off, it will be murder of the second degree under the statute. If in a collision between two persons one is stabbed by the other with a knife who seizes a loaded gun at hand and shoots and kills him, it will amount to manslaughter only.

New Castle County, November Term, 1871. At this term Stephen H. Costen, a Justice of the Peace of the county, was indicted and tried for the murder in the first degree, of Charles W. Woolsey, a public school-teacher, in the town of Christiana, on the night of the fourth day of the present month.

The parties were both bachelors and had been intimate friends up to the evening just mentioned. They were together at King's hotel in the village that evening, where they were joined by the two most material witnesses in

the case, Lemuel Butler before nine o'clock, and William T. Cann about ten, who testified that Costen drank three times while he was there and was then intoxicated, but Woolsey apparently not so. They all four remained there till about twelve o'clock and left together for their several homes. After they got out and started, Costen said to them he was going then to have some supper and wanted some beef, and they all went round to Cann's slaughter-house and got some, and then went with it to Costen's house, where he at once went to work to have the supper prepared. Another person joined them on their way to Costen's house by the name of Rickards, and when they took their seats at the table, Costen and Woolsey did not, but remained on their feet attending to the cooking and waiting on the table, until they were about done when they also took seats at the table; and Butler testified that when he left there about three o'clock in the morning nothing unpleasant had occurred up to that time, and Costen and Woolsey were then sitting at the table together, Costen at the head of it and Woolsey at the side of it, and Cann lying on a lounge in the same room.

Cann testified that Costen, Woolsey and he sat down to the table together and ate supper, and immediately afterwards between half past 1 and 2 o'clock he laid down on a lounge in the room and soon fell asleep, and when he awoke Costen and Woolsey were both on their feet moving around the table, Costen away from Woolsey, and just then he saw Costen pick up a carving knife from the table and stretching it out in his hand with the point towards Woolsey, heard him say, "Woolsey, if you come at me again, I will give you this," when Woolsey advanced a step or two towards him and was then three or four feet from him, saying to him as he stepped forward he did not care a d—n for him or his knife either. As he advanced Costen stepped from the room through the open door into the passage, and he then could not see him, but in a moment or in not more than a minute after he left the room, or more than a minute from the time he awoke

and first saw them moving around the table, a shot gun was fired from the passage into the room, by whom he could not see, and Woolsey fell to the floor near the lounge on which he still was, and so near to it that he had to step over his body when he arose from it. The whole charge had entered his left breast. But he neither saw the gun when it was taken up in the passage, nor when it was fired. It was very quick after Costen's going out of the room into the passage that it was fired. As he passed out of the room he heard Woolsey say to him, "you son of a bitch, I have taken your abuse long enough!" As soon as Woolsey fell, Costen reappeared at the door and said to him to catch the artery and stop the blood, and that was the only thing he then said, and soon after the witness left the house for a doctor, and on returning with him in about fifteen minutes afterwards, he pronounced Woolsey dead and he then heard Costen say that he did not intend to kill him, but shot to take his arm off, for he, Woolsey, had stabbed him in the back, and that he felt the blood running from the wound down his back when he went out of the room into the passage. When he awoke, Woolsey was very near his head as he lay upon the lounge, and as he was moving around the table after Costen, neither of his arms were raised, but both of his hands were down by his side, and he saw no knife or weapon of any kind in his hands.

The Doctor testified that when he reached the house he found Costen sitting on the steps at the door of it talking to himself incoherently, and when he pronounced Woolsey dead he enquired of him if he was dead, and got him to examine a fresh cut wound in his back, which he found to be on probing, an inch and three-quarters in depth and three quarters in width. Costen's own knife which he produced was not sufficient to make it, but a knife afterwards found in the inside coat pocket of Woolsey he found would have made such a wound, and would also have made the cut over the wound in the coat of Costen.

It was further proved that Costen was a sportsman and kept a bird gun and frequently left it standing loaded in his passage and other places about his house, and that it was so charged on the occasion in question.

There was a coroner's inquest and a *post mortem* examination of the deceased, showing that the wound was not only mortal, but that death was almost instantaneous, and before which the prisoner made a voluntary confession in due form, setting forth the facts as already substantially detailed in the evidence, and declaring that his only intention was to shoot off or disable the right arm of the deceased, and not to kill him, which the State offered and read in evidence.

Bates, Deputy Attorney General. There was no direct evidence, although there was an eye-witness present, it would seem from the inception of the tragedy, that nothing more than an assault was at any time threatened by the deceased against the prisoner, and if to repel that it appeared that the prisoner retained sufficient coolness and self-possession to reason and reflect, the act was committed with deliberation and with malice, and the offense was murder, for the law recognizes no particular number of moments for cooling time. The only question is then, was he cool, was he deliberate at the moment he committed the act? The changing of the carving-knife as his first deadly weapon for the gun was an exercise of choice, of reason and reflection, and was evidence of deliberation and of malice. But when he had retreated in safety from the room to the passage, why did he not retire still further from that scene of discord and midnight debauch between him and his friend? And why did he stop there to pick up the gun, and yet think long enough as he raises it and levels it at him that he will not kill, but only take one of his arms off? On the contrary, was it not evidently his foregone conclusion and deliberate intention from the first as he was moving around the table, to reach

the gun as far more available for his purpose of killing Woolsey, than the carving-knife? And particularly, as he could do it with that at a much safer distance from him. And all of which clearly showed coolness and deliberation, as well as malice, even express malice aforethought, on his part.

That even, if it were true that the prisoner with such coolness, calculation and deliberation, fired the gun at the deceased with the intention only of shooting his arm off, or disabling him in it, and yet killed him in so doing, it would be murder with express malice aforethought and of the first degree under the statute. And he asked the Court to charge the jury to that effect.

Gordon, for the prisoner, on the contrary, asked the Court to charge the jury that to constitute murder of the first degree under the statute, it must be committed with an intent to kill, or in perpetrating, or in attempting to perpetrate, a crime punishable with death. 3 *Greenl. Ev. Sec.* 145.

Lore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury. Homicide is the killing of any human being. It is of three kinds, known to the law.

First, as justifiable, being such as is committed from unavoidable necessity; as where an officer executes a criminal by command, and in strict conformity to the requirements of the law in every particular, or where the killing is for the advancement of public justice; as where an officer in the due execution of his office kills a person who assaults and forcibly or violently resists him; or, if a felon flee from justice and in pursuit he be killed where he cannot otherwise be taken. Or where the killing is for the prevention of any atrocious crime attempted to be committed by force; such as murder, robbery, house-breaking in the night time, rape, mayhem or any other act of felony against the person. But in all such cases,

the attempt must be not merely suspected, but clearly apparent and the danger must be imminent, and the opposing or resisting force must be clearly necessary to avert the threatened danger or to defeat the attempted felony.

Second. Excusable Homicide. 1st. By misadventure, as where a person doing a lawful act unfortunately kills another: as if he be at work with a hatchet and the hatchet accidentally flies off and kills a bystander; and so, in other like cases. 2ndly. Killing in self-defense which is where one is assaulted upon a sudden affray and in the defense of his person where certain and immediate suffering would be the consequence of waiting for the assistance of the law and there existed no other probable means of escaping impending death or enormous bodily harm, he kills his assailant. But to reduce the killing in self-defense to this degree and thus to make it excusable, it must be shown by the evidence that the slayer was closely pressed by his assailant and retreated as far as he conveniently or safely could in good faith, and with an honest intent to avoid the violence of the assault. And the jury must be satisfied from the evidence that unless he had killed his assailant, he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm. I have called your attention to the laws of justifiable and excusable homicide because of the very erroneous notions prevailing in the community on this subject, and not because there exists any necessity in this particular case for my doing so. The 3d kind of homicide is felonious, and is either murder or manslaughter, and if murder, it is either murder in the first or second degree; if in the first degree, the crime is punishable with death; if of the second degree, by fine, pillory, whipping and imprisonment for life.

Murder may be defined or described as the unlawful killing of a human being under the peace of the State with malice aforethought, either expressed or implied. It must be committed by a person of sound memory and discretion. It must be an unlawful killing, not excusable

or justifiable, and the killing must be committed with malice aforethought either express or implied. Malice as an ingredient in the crime is the essential criterion by which murder is distinguished from manslaughter. Whenever malice is the moving cause of the act committed which results in death, the crime amounts to murder. Malice in its legal sense, the sense in which it is used in respect to the crime of murder, is more comprehensive than mere personal hatred or malevolence towards individuals. For whilst it includes hatred it also comprehends and characterizes all acts committed with an evil disposition, all wrongful acts injurious to another done intentionally without just cause or excuse, all acts done from an unlawful and wrongful motive. Malice therefore according to its legal signification may be said to characterize all acts done voluntarily and with a wilfull disregard of the rights or safety of others. Where the act of killing is committed with express malice it is murder in the first degree. Express malice is where one person kills another with a sedate, deliberate mind and formed design, which formed design may be variously manifested, as for instance, by laying in wait, by former menaces or threats disclosing a disposition or purpose to commit the act charged, former grudges, former ill-will, secret enmity, hatred or sullen malevolence towards the deceased; or in fact by any other circumstances which disclose an evil or wrongful intention or purpose of the accused towards the deceased. Killing with express malice as I have said, constitutes murder in the first degree. Implied or constructive malice is an inference or conclusion of law from facts proved. It is implied by law from every deliberate, cruel act committed by one person against another, however sudden the act may be. For common sense teaches us that whoever voluntarily or willfully does a wrongful and injurious act against another does it maliciously.

The intention to kill is the grand characteristic which distinguishes murder in the first degree from murder in the second degree. Wherever therefore there is a design

or intention deliberately formed in the mind to take life, and death ensues in consequence of such design or intention, it is murder with express malice, and consequently murder in the first degree. The act of violence therefore from which death has ensued, in order to amount to murder in the first degree must be done deliberately with express malice, of the existence of which malice the design or intention to take life is the evidence. Murder in the second degree is where the malice necessary to constitute it, is implied by law. And malice, is implied by law from any deliberate, cruel act committed by one person against another, however sudden. While therefore there exists no design or intention to take life, but death ensues from an unlawful act of violence on the part of the slayer, and in the absence of adequate or sufficient provocation, it is murder with or by implied malice, and consequently murder in the second degree. I have said that the act of violence charged as causing death, in order to amount to the crime of murder, must be committed with a "deliberate mind and formed design." Certainly this is a just, and at the same time, a humane provision of the law. Deliberately and willfully doing an unlawful or wrongful act of violence without just cause or excuse, indicates the existence of malice in the perpetrator, and where death ensues from such an act, malice makes it murder.

It is especially necessary, therefore, to enable you to properly discharge your duty as jurors, that you should comprehend and understand the legal significance of the terms "deliberate mind, and formed design." Now, no specific length of time is necessary to make an act a deliberate act, in legal contemplation. A deliberate act may be very sudden. It does not so much import in its legal acceptation, an act done after time for reflection, as a voluntary act done upon motive of purpose and design, in contradistinction to acts done in the heat of passion, a paroxysm of resentment, in which reason and choice for the moment have lost their controlling influence. The

very definition of murder with implied malice shows that this is the legal signification of the term "deliberate," when used in this connection. Malice is implied by law from any deliberate, cruel act committed by one person against another, however sudden. Such is the explicit and uniform declaration of the law upon this subject. Your own experience and observation, gentlemen, must have taught you that the most sudden and instantaneous act may be attended with circumstances which leave no doubt on the mind that it was the result of deliberation. Indeed, we are left in no uncertainty in regard to the legal meaning of the term "deliberate," for it is well settled in the law both in this country and in England, that if the design to take life be but the conception and intention of a moment, it is as deliberate in legal contemplation as if it had been the design of hours, and that if the person killing had time for reflection or thought and did not think, and did then intend to kill and death ensued from his act of violence, it is just as much a case willful, deliberate, premeditated killing, as if he had intended it for hours. The intention to take life may be shown by a variety of external circumstances surrounding or connected with the fact of killing; such for instance as the declarations of the slayer; the mode or manner of killing, the character of the instrument used as a deadly weapon, or weapon likely to produce death, as well as by the manner in which the weapon was used by the slayer. All instruments likely to take life are deadly weapons. A gun is emphatically a deadly weapon.

Now gentlemen, it is my duty to say to you that it is a well-settled rule of law of universal application, the wisdom of which will be recognized upon a moment's reflection, that every man is presumed to contemplate and intend the ordinary and natural consequences of his own voluntary act. If the act thus voluntarily and willfully done has a direct tendency to destroy the life of another, the natural conclusion from the fact is, that he intended to destroy such a person's life so that if a person voluntarily

discharges the contents of a loaded gun against the person of another, the presumption is that he intended to kill him. As a general rule, all homicide, all killing of a human being is presumed to be malicious, and of course amounts to murder until the contrary appears; and therefore, it is incumbent upon the accused to make out by proof to the satisfaction of the jury, all such circumstances of alleviation, mitigation, extenuation, justification or excuse as may be relied on as matter of defense, unless such proof arises out of the evidence produced against him. It follows, therefore, that the presumption of malice arising from the fact of killing may be rebutted, overborne and displaced by showing circumstances of alleviation, mitigation, extenuation, justification or excuse. Now, gentlemen, you will bear in mind that what I have said in regard to deliberation, formed design, and intention to kill, have exclusive reference to the fact of malice, either expressed or implied, the existence of which is absolutely necessary to constitute the crime of murder.

But there is another crime of a lower grade, called manslaughter, to which I now wish to call your attention, and in doing so, I shall endeavor to enable you to understand in what respect it differs from the crime of murder, whether of the first or second degree. Murder results from and is attributable to pre-conceived malignity of heart, but voluntary manslaughter on the other hand is solely imputable to human frailty, the act of killing proceeding from heat of passion, a paroxysm of resentment, caused by adequate provocation. Malice is the impelling cause in murder; but it is not so in manslaughter, for in manslaughter there exists no malice. Murder proceeds from a wicked, depraved and malignant spirit, a heart regardless of social duty and perversely bent upon mischief. Voluntary manslaughter, on the contrary, is the unfortunate result of acts of unpremeditated and thoughtless violence, of acts of blind and unreflecting rage, caused by adequate provocation in which reason and choice for

the moment have no agency. But it is only to such acts as these, where there is no malice, that the law, in view of the infirmity of human nature, extends its benign and merciful consideration, so as to reduce the crime to manslaughter. Voluntary manslaughter, therefore, may be defined to be the unlawful killing of another in heat of blood, upon adequate or sufficient provocation and without malice, either express or implied. But in order to reduce the crime to manslaughter, where a dangerous or deadly weapon is used as the instrument by which death is caused, the provocation must be great indeed; so great, in fact, as to produce such a transport of passion and heat of blood, such an actual frenzy of the mind, as to render a man for the time being, utterly deaf to the voice of reason. If the act of killing is attended with circumstances showing preconceived malignity of heart, deliberation or formed design, it will not be manslaughter, but murder.

Provocation to avail anything, must be something which the slayer feels at the instant of its occurrence, and he must act under the sting of that provocation and resent it at once and without delay or time for thought or reflection. If between the provocation and the act of violence causing the death, there intervenes sufficient time for passion to subside, or the blood to cool, or time under the circumstances for the exercise of reflection and the formation of a deliberate purpose in regard to the act which he is about to do, provocation will not avail anything. For no provocation however great, will justify a man in killing another, nor will it excuse him. Killing on adequate or sufficient provocation must, at least, therefore, amount to manslaughter.

Now, gentlemen, I have endeavored to explain to you briefly, the characteristic and nature of malice in general, and also to point out to you the distinctive differences between express malice and malice implied by law from facts actually proved, and also to explain what under our statute law amounts to murder in the first and murder in the second degree. I have, moreover, stated to you the

rules or principles in regard to the crime of manslaughter, which is the lowest grade of felonious homicide. I have also endeavored to point out and explain to you by language as plain and significant as I can command, in what respect manslaughter differs from murder. Having thus, as I trust, enabled you to comprehend and understand these several matters, especially the legal meaning and import of the term malice, which enters so largely into the question of felonious homicide, as constituting the grand criterion distinguishing murder from manslaughter, I may, I think, without any impropriety and without in the least trenching upon the undoubted province of the jury, advert for the moment to material and undisputed facts disclosed by the testimony.

Gentlemen:—The terrible tragedy which resulted in the instant death of Charles Woolsey occurred on the early morning of Sunday, the 5th of the present month. The slayer and the slain had for several years antecedent to the fatal controversy, stood towards each other in the relation of mutual and intimate friends. They had often engaged in earnest disputation with each other, and at various times each of them for the moment became angry with the other, but it seems that this anger speedily passed off without, apparently, leaving any rancor in the heart of either. The material facts, as disclosed by the evidence, are but few in number and are easily stated. As to the origin or exciting cause of the controversy the testimony is silent. We know nothing definitely. We find the prisoner and Woolsey at the house of Mr. Caulk, at about 12 o'clock on Saturday night, in company with several friends. The prisoner and Woolsey prepared supper and set the table in the front room and their friends sat down and partook of the supper sometime between one and two o'clock on Sunday morning, the prisoner and Woolsey waiting on them at the table. It does not appear at what hour precisely these companions (except Cann) left the house. Cann says he laid down on the lounge between half-past one and two o'clock and went to

sleep, and that when he laid down the friends were all there—when he awoke they were all gone. Up to this time there is no evidence of a quarrel between the prisoner and the deceased. Something certainly occurred and awoke Cann. When he awoke he saw Woolsey standing near his (Cann's) head as he lay on the lounge and Costen near to Woolsey within striking distance, and Costen immediately moved down the room round the corner of the table—a portion or corner of the table being between them—and picking up a carving knife, he shook it at Woolsey and said to him "If you come at me again I will give you this," or "I will stick you with this." Woolsey replied, "I don't care a d——n for you or your knife," and advanced a step or two towards Costen, who immediately moved out of the room into the entry toward the door leading into the back room, Woolsey saying as he was so passing out of the room, "I have taken the d——d son of a bitch's abuse long enough," or "You d——d son of a bitch, I have taken your abuse long enough," for the witness states the remark both ways. At the time when Woolsey advanced towards Costen they were about four feet apart. Witness saw nothing in deceased's hands, and no attempt or offer to strike. Witness thinks that "between the time of Costen leaving the room and his hearing the report of the gun, he kind of lost himself a little;" but does not think it was for more than a minute. He says in another part of his evidence, "As near as I could come at it, about a minute elapsed between Costen's going out of the room and the report of the gun." At the time the gun was discharged, Woolsey was not moving—he was standing but a step or two from where Cann first saw him near his head. He was standing where he paused in his advance towards Costen. He was struck by the load discharged from the gun in the left breast and fell where he first stood and died almost instantly. Costen came forward to him immediately and requested Cann to catch the artery and stop the flow of blood but it could not be done. Cann finding that he could not stop the

flow of blood left the house, went and aroused the keeper of the hotel, and at the latter's suggestion, went after Dr. Hudders. It was probably from a quarter to half-past three o'clock when Woolsey was shot; for the Doctor says he was waked up by Cann at about a quarter to four o'clock, and proceeded immediately to Caulk's house, and upon examination of the body of Woolsey he found him already quite dead. At the time he (the Doctor) entered Caulk's house he passed Costen who was sitting on the door step, with his head leaning on his hands. As the Doctor was about to leave the house Costen told him that he was hurt, and that Woolsey had stabbed him in the back. He worked his way, the Doctor says, into the room, and the Doctor examined the condition of his back and found an incised wound just below the shoulder blade, and between that and the spinal column—in depth about one inch and three-quarters, and in width about three-quarters of an inch. The wound at the time he examined it was somewhat swollen, and was, in his best judgment, an inch and a half in depth immediately after its infliction. Costen subsequently made a statement before the Coroner's jury, which was reduced to writing, and is now before you as a part of the evidence.

Whether his statement, assuming it to be true, indicates thought and deliberation, is a question for your decision under the circumstances of the case. It is manifest, however, I think, that but a short time elapsed between the prisoner's leaving the room and the report of the gun. Cann thinks it was about a minute. It may have been more—it may have been less. But whether the time was shorter or longer, if you shall be satisfied from the evidence that the prisoner in that short space of time deliberately formed the design, purpose or intent to kill the deceased, and in execution of such deliberation, purpose and intent shot him to death, his crime will amount to murder with express malice, and hence to murder in the first degree. If, however, you shall not be fully satisfied from the evidence that he intended to kill the deceased, but that

at the time he fired the fatal shot there was a deliberately formed purpose and design to disable the deceased by shooting off his arm, his crime will amount to murder in the second degree; for such an act would be an unlawful, cruel act—an act without either justification or excuse—from which the law implied malice and which constitutes the test or criterion of murder in the second degree.

But, gentlemen, if you shall be satisfied from the evidence that at the time or immediately preceding the waking up of the witness, Cann, there was or had been a collision or contest between the prisoner and the deceased, and that the deceased then and there stabbed the prisoner in the back and inflicted the wound spoken of by Dr. Hudders and Wm. T. Cann, then, I say to you, that such stabbing was a provocation, indeed a great provocation, and if the prisoner acted immediately and without delay under the sting of that provocation induced by a sudden transport of passion and in a moment of frenzy or heat of blood caused by that provocation, and without deliberation or formed design, suddenly rushed from the room and seizing the gun discharged its contents against the body of the deceased, his crime will be reduced to manslaughter; for from such a sudden act, done in the heat of blood upon reasonable or adequate provocation and without deliberation, the law does not imply malice, but attributes the act to the infirmity of human nature. A few more words, gentlemen, in regard to the law of this case, and I shall close what I deem it to be my duty to say to you on the present occasion. 1st. I repeat to you that whenever there is a design or intention deliberately formed in the mind to take life, and death ensue, it is murder with express malice and therefore murder in the first degree. 2d. When there exists no design or intention to take life, but death results from an unlawful act of violence on the part of the slayer, and in the absence of adequate provocation, it is murder with implied malice and therefore murder in the second degree. 3d. Voluntary manslaughter is the

unlawful killing of another in heat of blood upon sufficient or adequate provocation and without malice. But no provocation, however just, will justify the killing of another, nor will it excuse the act. Killing upon provocation cannot be less than manslaughter.

Verdict—Guilty of manslaughter.

THE STATE v. ALFRED BOICE.

Express malice is where one person kills another with a sedate, deliberate mind and formed design; and such design may be shown by the circumstances attending the act, such as the deliberate selection of a deadly or dangerous weapon, antecedent threats or menaces, and privily lying in wait, former grudges and preconcerted schemes to do the party slain some great bodily harm. And when committed with express malice aforethought it is murder of the first degree under the statute.

Implied malice is an inference of law from the facts found by the jury; and among these facts, the actual intention of the prisoner at the commission of the fatal act becomes an important and essential fact to be ascertained by the jury, for though he may not have intended to take away life, or to do any great bodily harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, such for instance, as intending to rob the party slain, from which the law raises the presumption of malice. If he intended to kill him, he is guilty of murder of the first degree, but if he did not intend to kill him, and was engaged in any other felonious or unlawful act, such as an attempt to rob him, or the like, he is guilty of murder of the second degree.

New Castle County, November Term, 1871. At this term of the Court, Alfred Boice, negro, was indicted and tried for the murder of John Mawheney, of the first degree, near Middletown, on the 9th day of August preceding. The dead body of the deceased, who was an aged, feeble and delicate man, was found lying on the road between Middletown and Armstrong's Corner, with the bridge of his nose broken and crushed in by one or more violent blows, apparently. A pocket-book was found on the

ground near it, which it was proved had been purchased by the prisoner that afternoon in Middletown. It was also proved by another witness that he was on that part of the road that night when the prisoner came up the road and said to him that there was a peach-pluck behind them, let's go through him; he asked him how he knew, and he said he had just seen him. In a little while he came along, when the prisoner went up to him and said, "Where is that five cents you owe me?" to which he replied that he had before told him he had no money. The prisoner then struck him and knocked him down; he then raised partly up on one of his arms and said, "Oh! see my face!" and then told him if he would let him up he would let him have what money he had, to which the prisoner replied, "You told me a lie then, did you, when you said you had no money?" and struck him again, and knocked him flat on his back, and then left him lying there. He struck him both times with his fist. This testimony was corroborated by several other witnesses for the State, one of whom met the deceased, whom he knew, and two negro men whom he did not recognize, about nine o'clock that night, on the road as he was walking into Middletown, the two negroes walking close beside each other, and the deceased just behind them, walking in the same direction; and he was the first person on his return, in about an hour afterwards, to find his dead body lying flat on its back in the road not far from the place where he had met them. And another, that he passed the deceased and two or three other persons with him, walking up the road that night as he was going from Middletown to Armstrong's Corner. They were walking quite slow when he passed them, but just before he reached Armstrong's Corner, he saw and recognized the prisoner and the first witness examined as they passed him together walking fast, and went on up to the corner ahead of him into a crowd of colored people then collected there. And another, that he heard the prisoner say to some persons standing there as he came up into

the crowd, "not to fool with him, for he had just knocked a man stiff down the road!" And another, that he saw the prisoner in the store that night stretch out his hand, and at the same time say to some men standing around, "Do you see that?" and then add that he had just knocked some d—d old son-of-bitch cold down the road! and that his knuckles were then skinned, and there was blood on his fingers. And another, that he heard the prisoner say there that night, that he had killed one man down the road, and if they did not look out he would kill another. The deceased was a very quiet and inoffensive person, and a gardner in the service of a gentleman residing in the neighborhood.

The physicians who performed the *post mortem* examination of the body at the coroner's inquest, testified that it was a contused wound, which might have been made with a blunt instrument, or with a fist. The bones of the nose were broken, and it was such a blow, or blows, as by concussion of the brain might have produced death, and, in their opinion, that was the cause of his death.

Bates, Deputy Attorney General, contended that the evidence clearly showed that, cruel as the act was, it was not committed suddenly, but coolly and deliberately, and after consideration of the matter by the prisoner, without any offense or provocation whatever on the part of the deceased, and almost without any other apparent motive for it than the quintessence of malice itself. It could, therefore, be nothing less than murder committed with express malice aforethought, and of the first degree under the statute.

Hodgson, for the prisoner. That it was a case of murder with implied malice, and of the second degree only under the statute.

The Court, Wooten, J., charged the jury. The prisoner at the bar is indicted and on trial for the highest crime known to the law of this State. He is charged with the

commission of the crime of murder in the first degree, the crime being alleged by the State to have been committed by taking the life of John Mawheney, on the 19th of August last.

Murder is where a person of sound mind and discretion unlawfully kills a reasonable creature, with malice aforethought, either express or implied. At common law such killing was murder without any distinction of degrees, but our statute has divided the crime into two degrees, the first and second, and the killing of a human being unlawfully and with *express* malice, is murder of the first degree, and where there is no express malice aforethought, and the fact of killing is done under such circumstances as to make it a case of implied or constructive malice, the crime is murder of the second degree. The division of the crime of murder by our statute into the first and second degree, merely changes the punishment and modifies it, leaving the crime in the first degree punishable with death, and making it in the second degree punishable by fine, whipping, pillory, and imprisonment for life.

Every homicide is held to be malicious and premeditated, and therefore amounting to murder, unless it otherwise appears by some facts or circumstances of excuse, justification or alleviation, and this may be shown either by evidence disclosed on the part of the prosecution, or by the defense. In order to distinguish between the two grades of the crime of murder, a proper application of the law of express and implied malice is necessary, for if the homicide is committed with express malice, the crime will be murder of the first degree, but if committed with implied malice, it will be reduced to the lower grade of murder, that is, murder of the second degree. Express malice is where one person kills another with a sedate, deliberate mind and formed design; and such design may be shown by the circumstances attending the act, such as the deliberate selection of a dangerous or deadly weapon, knowing it to be such, antecedent threats

or menaces, and privily lying in wait, former grudges and preconcerted schemes to do the party slain some great bodily harm, or the like. Implied or constructive malice is an inference or conclusion of law from the facts found by the jury; and among these facts, the actual intention of the prisoner at the time of the commission of the fatal act, becomes an important and essential fact to be ascertained by the jury, for though he may not have intended to take away life, or to do any great personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, such for instance as intending to rob the party slain, from which the law raises the presumption of malice.

The matters to which you should first direct your inquiries in this case are, whether John Mawheney, the party alleged to have been murdered on the 19th of August last, is dead, and whether he came to his death by acts of violence inflicted upon him by the prisoner at the bar. I presume you will have but little difficulty in determining these facts. If you shall be satisfied from the evidence before you that John Mawheney is dead, and that he came to his death by acts of violence by the hands of the prisoner at the bar, you will then determine the character of the offense, whether it is murder of the first or second degree. I say whether it is murder of the first degree, or murder of the second degree, because I feel constrained from a sense of duty to say to you, that there is not the slightest evidence before you of any sort of provocation, and therefore the offense cannot be reduced below the crime of murder of the second degree, and the important inquiry is, whether it is of the first or second degree. This fact, it is your duty to determine from the evidence and all the surrounding circumstances.

If the homicide was committed, and John Mawheney was killed by the prisoner with express malice aforethought, such as I have described it to you to be, he is guilty of murder of the first degree. But if there was no express malice by which the prisoner was moved and actuated in

the commission of the offense, and it was done under such circumstances as come within the principle of implied malice such as I have described that to you to be, then the crime would be murder of the second degree. And here, as I have before said to you, it is essentially necessary to the determination of the question of express or implied malice, to ascertain and satisfy yourselves as to the intention of the prisoner at the time of inflicting the violence, whether he did or did not intend to take away the life of the deceased. If he did intend to kill him, he is guilty of murder of the *first* degree; but if he did not intend to deprive him of life, and was engaged in any other felonious and unlawful act, such as an attempt to rob him, or the like, he is guilty of murder of the second degree. I believe I have said all that is necessary that I should say to you in reference to the law applicable to the case, leaving the facts, without comment, entirely for your determination, it is neither our province or desire to discuss them. You will now take the case and give it that deliberation and consideration which its importance to the prisoner as well as the State demands, and render such verdict as your sense of duty under the responsibility which has devolved upon you may require. Giving to the prisoner the benefit of any reasonable doubt that you may entertain growing out of all the facts and circumstances of the case. Such doubt, however, should be such only as men of thought and discretion, as you doubtless are, would reasonably entertain, and as are irreconcilable with the evidence on which you are sworn to give your verdict.

Verdict—"Guilty of murder of the second degree."

THE STATE v. JAMES ADAMS AND JOHN AIKEN.

The gist of the offense alleged in an indictment for a conspiracy to do an unlawful act, consists in the agreement to commit the act, and it is complete as a conspiracy and indictable as such, without doing any overt act in execution of the agreement, or of the design with which it was entered into.

Upon an indictment alleging that the two persons named in it conspired together, and with divers other evil-disposed persons whose names were unknown to the grand jury, to commit the crime alleged in it, one of them may be convicted, and the other acquitted, if the jury are satisfied from the evidence that any other person conspired with either of them to commit it.

Court of General Sessions, &c., N. C. County, November Term 1872. James Adams and John Aiken were indicted and tried at this term of the Court for a conspiracy to break and enter the National Bank of Newark with the intent to rob it. The indictment contained five counts, each of which charged that they conspired together, and with divers other evil disposed persons whose names were unknown to the grand jury, to commit the crime alleged in it; and the conspiracy as alleged was proved by the testimony of two witnesses who fully admitted and stated that they were accomplices in it, and why they ultimately failed to accomplish their purpose of breaking and entering the bank with the intent alleged in the indictment.

Bates, Deputy Attorney General. When the agreement between the parties to do the alleged unlawful act is proved, the conspiracy is proved without any further evidence. 2 *Archb.* 1045. 3 *Greenl. Ev. Secs.* 91, 97. 2 *Mass.* 329. 2 *Mass.* 536. 6 *Mass.* 74. 4 *Wend.* 229. *Cro. Car.* 380.

Whiteley, for the defendant. The testimony, such as it is, is insufficient to convict Aiken; but the testimony of both of the witnesses for the prosecution being accomplices by their own admissions in the alleged conspiracy, and which is uncorroborated by any other witness, is entirely unreliable and unworthy of belief. 2 *Amer. Crim. Law*, Sec. 2339. When, however, the charge in the indictment against two persons is that they conspired with each other, and also with others unknown and not named, it must be proved as alleged, either that they alone conspired together, or that both of them with others unknown conspired to commit the act, because without such proof under such an indictment, one cannot be convicted, and the other acquitted, since it takes two at least to make a conspiracy. 3 *Greenl. Ev. Sec.* 97. 2 *Archb.* 1045, 1055. 4 *E. L. & E. R.* 287.

Lore, Attorney General, replied.

The Court, Gilpin, C. J., charged the jury, that the offense charged in the indictment consisted in the conspiracy or combination to do the unlawful act alleged in it, and the gist of that offense consisted in their agreement to commit the act, and it was complete as a conspiracy, and indictable as such, without the doing of any overt act whatever in the execution of the agreement, or the design with which it was entered into. But it was not true as contended for by the counsel for Aiken, that under the indictment and proof, one of the defendants could not be convicted or acquitted without the other, for if the jury should be satisfied beyond a reasonable doubt that either of them conspired with the witnesses, Greenwalt and Miller, or either of them, to commit the act, he might be convicted, and the other might be acquitted.

Verdict—Adams guilty. Aiken not guilty.

THE STATE v. JOSEPH G. BURTON.

On an indictment and trial for rape, it behooves the jury to be satisfied from the evidence beyond a reasonable doubt, first, that the alleged rape was actually committed and consummated, and secondly that it was committed by the prisoner at the bar, with force and against the will of the prosecuting witness; but to consummate the rape and complete the offense, it is not necessary under our statute on the subject to prove more than an actual *penetravit* to warrant a conviction of the offense.

Sussex County, April Term, 1873. At a Court of Oyer and Terminer held at this term, Joseph G. Burton, *alias* Joseph G. Green, a young negro man, was indicted and tried for a rape committed on the body of Hannah M. Lank, a young white girl between thirteen and fourteen years of age, in Lewes and Rehoboth hundred, on the 24th day of March preceding. She was living in the family of her uncle, James Lank, which resided on a farm a half mile from Rehoboth Station, on the Junction and Breakwater Railroad, where he was keeping store; the shortest way, and the one generally used by persons on foot passing between the farm and the station, being simply a well-beaten path leading nearly the whole distance through woodland and across two small rivulets, from two to three hundred yards apart, and between which the growth of wood and timber was denser than in any other part of it.

In her testimony she stated that she left the farm that morning about nine o'clock to go to the store of her uncle at the station, and reached it a short time before the morning train from Lewes arrived at the station, and saw the prisoner come into the store while she was in it, but he went out of it about the time the train arrived, and she left it to return to the farm about the time the train was starting again, and she then saw the prisoner coming from the railroad platform towards the store, as she left it and started in the opposite direction to go by the usual pathway from there to the farm. But she met him in the woods between the two branches, when he spoke civilly

to her as he passed her walking in the opposite direction; he afterwards, however, turned round and followed her, and overtook her after she had crossed the second branch, and as he came up behind her he threw one of his arms around her and then immediately clasped the other around her and threw her down on the ground, when she commenced struggling with all her might to get away from him, and for an hour it seemed to her, screaming and begging and fighting all she could, till he got her clothes up sufficiently to force and hold them in her mouth and stop her screaming, and by choking her and exhausting her strength, until he finally entirely overpowered her and accomplished his purpose. And to the direct question, she expressly declared that he consummated the rape.

The only question involved in the case was as to the identity of the prisoner with the person who committed it. She herself identified the prisoner as the person, without hesitation, described the person who did it, as of his size and color, with a little short beard on his upper lip, and that some of his front teeth were a little crossed. He had on no coat or vest, but wore a knit shirt of a faded gray color, and dark pantaloons; and that the first time he was brought to the farm that day after his arrest, for her to see him, he had on an outer green and white striped shirt, but the second time he was brought there that day she saw the shirt he had on under it, and it was the same he had on in the morning when he ravished her. The ground where it was done was low, soft and somewhat muddy.

Her aunt's testimony was that she came back to the house very much exhausted, and crying, and at once informed her that she had just been shamefully assaulted and outraged by a black man in the woods on her way back from the store, and that she had been ravished. That her dress was badly torn and very muddy, and that she was so sore and feeble for two or three days afterwards that she could hardly get in or out of the house.

The testimony of her uncle, James Lank, was that both the prisoner and his neice, Hannah M. Lank, were at the store that morning about fifteen minutes before the train reached the station from Lewes, and that she left the store about the time the train started, and he left before her. And the ground where the outrage was committed bore the marks of a violent and protracted struggle between them, for it was trampled and indented in the scuffle with the irregular tracks of feet, heels and toes for a space of over two hundred square feet, and when the prisoner was arrested in a few hours afterwards, the knees of his pantaloons were all covered with mud of the same color as the mud there.

The testimony of Handy Watson, was that he saw the prisoner that morning about an hour after the train had left, on the Pilot Town road going east, and just up the hill beyond the bridge near Rehoboth Station, and that the knees of his pantaloons were muddy, and he was whipping the mud off them with a stick as he was walking along when he saw him.

Nelson Card testified that he was close to Richard's store, about a mile from Rehoboth Station, and saw the prisoner come up the road leading up there from the Pilot Town road, between ten and eleven o'clock that morning, and he noticed that his knees were very muddy, and that before he got up to the store and the corner he got over the fence and crossed the field in a muddy part of it, although the walking was better on the road. And James Welch, that he learnt of the outrage soon after its occurrence that morning, and went with others in search of the perpetrator of it. It had rained enough the night before to soften the ground very considerably even in the woods, and they soon discovered near the scene of it tracks sufficiently distinct to enable them to follow them up without once losing them, although one half of the time they led across fields and the other along roads, until they came up with and arrested the prisoner between three and four miles from there. He denied, however, that he was the man who had committed it.

The mother of the prisoner was the first witness called for him, and testified that he put on late on the Saturday afternoon before that day a light-colored knit shirt, and he had another of a faded light blue color, which was clean and laid away that day at her house. He was twenty-two years old on the last day of February. The shirt he put on on Saturday, and referred to by her, was then proved and put in evidence. And Mr. Rodney Lyons afterwards testified that he saw the prisoner at Rehoboth Station that morning, and that he then had a shirt on like the one put in evidence, and here shown him; and Mr. James Lank being called for the prisoner as a witness, testified that there were a good many persons, both white and black, in his store that morning by the time the train had left that station.

The Court, Gilpin, C. J., charged the jury, that in view of the fact, as had long before been remarked by an able English jurist, that it is a charge easy to be made, and hard to be disproved, and of the great magnitude and vital importance of it to the prisoner, it behooved the jury to be satisfied beyond a reasonable doubt from the evidence in the case, first, that the alleged rape was actually committed and consummated in the case; and if so, in the second place, that it was committed by the prisoner at the bar, by force and against the will of the principal witness in the case, the young girl, Hannah M. Lank. The Court would, however, say to the jury, as had already been said to them by the Deputy Attorney General in opening the case, that to consummate the rape and complete the offense it was not necessary under our statute on the subject, to prove more than an actual *penetravit*, but that nothing less than an actual *penetravit* would suffice to warrant a conviction of the great crime with which the prisoner was charged.

*Bates, Deputy Attorney General, and
Lore, Attorney General, for the State.
Moore, for the prisoner.*

Verdict—"Guilty."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* JOHN CARPENTER.

On an indictment for burglary with intent to commit a rape, the alleged intent is a material and substantive fact to be proved to the satisfaction of the jury, as much so as any other material allegation in it; and they must be satisfied from the facts and circumstances attending it that the breaking and entry was made by the prisoner with the intent to commit the alleged rape with force and against the will of the party named.

Kent County, Court of General Sessions, &c., April Term, 1873. John Carpenter, a young negro man, was indicted and tried for burglary in breaking and entering in the night time into the dwelling-house of Darling Johnson in Murderkill hundred, on the 9th day of May 1872, with intent to commit a rape on the body of Eliza J. Johnson, a young white girl and a daughter of his, aged fourteen years. She testified that she would be fourteen years old in August next, and that on the night of the 9th of May last she was asleep in bed with her little sister and brother younger than her in an end room in the second story of her father's house, in the end of which there is one window which was down when she went to bed that night, and that she was waked up during the night by feeling a hand on her breast, and felt it more than once on her breast, and at first as she awoke she

thought it was the hand of her brother or her sister, but soon became satisfied that it was not, and waked her sister and told her some one had pulled the clothes off her, and she believed there was some body in the room. She then got out of bed and started for the head of the stairs when her sister said she would go too, and calling to her father who with her mother was sleeping in the room below, they went down to their room together and she then waked her father and told him she believed there was some body in their room. Both her father and mother got up and they all went up stairs together, and looking under the bed she saw something under it and thought it was the bed clothes which had fallen off the bed, and so said to her father, but he then looked under it and found it was the prisoner; and who stated in his testimony that he found the prisoner lying on his side well back under the bed, with his face outward and his arms elbowed across and over it to hide it, but he at once recognized him and called him by name and he answered to it. He left him there until his daughter could run over for her uncle, John Cleaver, who lived near, and with whom the prisoner was then living and working as a hired hand on his place. The end window in the bed-room of his children was raised entirely up and there was a ladder outside of the end of the house extending from the ground up to near the window sill; and Mr. Cleaver testified that as soon as he got over there he recognized it as his ladder, and that it had been left at the close of that day leaning against the end of his house, and whence it had been taken during the night over to Mr. Johnson's house. Mrs. Johnson testified that the window the ladder was at had been up during the day, but that she let it down herself that evening about supper time, and that there was no ladder anywhere on their premises at that time until that was brought there. The constable who arrested the prisoner testified that he voluntarily told him that he carried the ladder over there from Mr. Cleaver's that night, leaned it against the end of the

house under the window, went up it and raised the window which was then down, and got into the room through it. He said he did not know why he did it, but he meant no harm by it.

The Court, Gilpin, C. J., charged the jury. This is an indictment against the prisoner, John Carpenter, for the crime of burglary alleged to consist in his breaking and entering in the night time on the 9th of May last, the dwelling-house of Darling Johnson in Murderkill hundred, with the felonious intent to commit a rape on the body of Eliza J. Johnson in the said dwelling-house. There can be no question about the breaking and entering of the dwelling-house in the night time as alleged, if the jury believe the evidence, which it seems is not disputed, that when he ascended to the window by means of the ladder he found it down or lowered, though not fastened, and raised it without any breaking or unfastening of it whatever, and entered the house, or the room into which it opened, through the window thus raised by him; for that would constitute a constructive breaking and entering into the house in law, and would have the same effect in law, as if there had been an actual and forcible breaking and entering into it by him on that occasion. But in addition to this the State must also prove to your satisfaction beyond a reasonable doubt, that he so broke and entered it with the felonious intention specifically alleged in the indictment, that is to say, with the intent to commit a rape on the body of Eliza J. Johnson in the dwelling-house, and this is the most material and important averment contained in the indictment, for it is this, if the allegation be true, which constitutes the breaking and entering into the dwelling-house the crime of burglary for which he stands indicted; and it is also the allegation of a substantive and material fact which must be proved to the satisfaction of the jury beyond a reasonable doubt, as much so as any other material and substantive allegation contained in it. Intentions, it is true, and criminal intentions in particular,

are in general only to be inferred and ascertained from the acts and conduct of the party and the facts and circumstances attending them which reasonably indicate them to the minds of others. A rape, however, can only be committed with actual force and violence and against the will of the party on whom it is committed, or by putting her in great fear or terror; and if sexual connection is sought or obtained by milder means, or in any other way with the consent or the silent submission of the party, it cannot constitute the crime of rape in contemplation of law. It would therefore be for the jury to consider and determine in this case from all the facts and circumstances proved, and the fact that the father and mother of the young girl were at the time sleeping in the room immediately below her, and that a younger sister and brother were then asleep in the same bed with her, whether the prisoner under such circumstances broke and entered the house with the intent then and there to have sexual connection with the young girl Eliza J. Johnson by force and against her will. For if that was not the intent with which he broke and entered the house, then he did not break and enter it with the intent to commit a rape upon her, and he ought not to be convicted under the indictment. If, however, the jury should be satisfied from the evidence that he so broke and entered it with that intent and it was solely a question of fact for their consideration, he should be convicted.

Bates, Deputy Attorney General, for the State.

Massey, for the prisoner.

Verdict—"Guilty."

COURT OF OYER AND TERMINER.

THE STATE v. ISAAC C. WEST.

In a trial for murder it is competent for the prosecution to prove that the prisoner had a motive for committing it, and what the motive was.

On such a trial and under the defense of insanity an odd collection of various articles of no novelty or value, even as curiosities, which the prisoner had made from time to time, and had long preserved with the view of starting a natural museum in the town of Milton, Delaware, was allowed by the Court to be produced and displayed in evidence before the jury.

Scientific works on what is termed medical jurisprudence, although admissible and allowed to be read on a trial before the Court and jury, have not the weight of legal authorities, except so far as the views expressed in them on the subject of insanity, have been recognized and sustained by judicial rulings and decisions in the trial of cases in Courts of Justice.

On an indictment for murder, if the accused under the plea of not guilty, the only plea usually entered to such an indictment, sets up at the trial the defense of insanity, and which admits by necessary implication that he committed the act of killing alleged in it, he is bound to prove, or it must appear from all the evidence in the case, to the satisfaction of the jury beyond a reasonable doubt, that he had not sufficient soundness of mind and reason when he committed the act, to be able to distinguish between right and wrong as applied to the act, and to understand the nature, character and consequences of it, and had not sufficient mental power to apply that knowledge to his own case, and had not through that knowledge and consciousness the ability to control himself, and choose by an effort of the will whether he would, or would not commit it.

And so when the ground of self-defense is set up under the general issue and plea of not guilty, the burden of establishing it to the satisfaction of the jury beyond a reasonable doubt, rests on the accused, unless it otherwise so appears from the evidence. And to constitute

and establish that defense in such a case as this, the jury must be satisfied from the evidence that the deceased made a violent assault at the time upon the prisoner, with a deadly or dangerous implement likely to produce death, or enormous bodily injury, and that the prisoner was in imminent peril of being killed or so injured by it, and that without having the time, or the means, or the opportunity of retreating from or avoiding such an assault upon him, he killed the deceased in repelling it.

A judicial confession of the homicide made by the accused and produced in evidence on the part of the State in the trial, derives from that circumstance no other weight or effect in favor of the prisoner, or against the State, than it would otherwise be entitled to in law. The whole of the confession, however, is to be considered and weighed by the jury, but it is not to be supposed or assumed that all parts of it, or all the statements contained in it, are entitled to equal weight and credit as evidence in the case; on the contrary, the jury may credit and believe that portion, or so much of it as charges, or is against him, and discredit and reject that part, or so much of it as is in his favor, or tends to excuse or exonerate him, if they find sufficient ground for so doing on a full consideration of all the evidence in the case.

Kent County, April Term 1873. At a Court of Oyer and Terminer held at this term Isaac C. West was indicted for the murder of Henry C. Turner, *alias* Couch Turner, of the first degree, and was tried at the adjourned term commenced on the 3d day of June following.

The indictment alleged that it was committed on the 2d day of December 1872, and the evidence produced by the prosecution was that two weeks prior to that time the prisoner rented the second floor, consisting of two rooms, a front and back one, of a house on Loockerman Street in the town of Dover, in which he introduced the necessary apparatus for the manufacture of a peculiar gas by a process of which he was the proprietor, to be administered by inhalation, and which he claimed possessed valuable healing properties in several kinds of diseases: and that when he applied to the owner of the house to rent them, and was informed by him that the house, though then unoccupied, was already rented for the ensuing year to another person to commence on the first

day of January following, he replied that he wanted to do enough in two weeks to make or break him, and on his assurance that he had seen the person referred to and that he would have no objection to his application for the rooms, and that he would do no injury to them, they were rented to him by the owner for the residue of the year. That the deceased, Couch Turner, was a negro and a common laborer, doing irregular jobs of work about the town when called on for that purpose; and that he was intemperate, but civil, obliging and peaceable in his character and disposition. That the prisoner went to a brother of the deceased and enquired for him about 8 o'clock in the morning of the second day of December 1872, and about 4 o'clock in the afternoon of that day the prisoner and deceased came to a liquor saloon adjoining the house in which the prisoner had his rooms on Loockerman Street, the deceased wheeling a large dry-goods box on a wheelbarrow, and stopped on the side walk in front of it, when the prisoner stepped into the saloon followed by the deceased, and calling the keeper of it aside, asked him to let the deceased have a drink, which he did, when the deceased filled a tumbler nearly full of brandy and drank it, for which the prisoner paid, and that the deceased was full of liquor when he entered the saloon. That soon after they left the saloon, the keeper of it stepped to the front door and looked out into the street and up and down it, but saw neither of them, and for that reason he supposed they had gone to the prisoner's rooms in the next building, as they had not had sufficient time to get out of his sight in any other way; and that so far as could be ascertained the deceased had not been seen alive by any one, except the prisoner, since that time. That on the following day the prisoner said to an acquaintance in conversation with him on the pavement in front of the door leading up to his room who had intimated to him a desire to see them, that he did not admit any body up there because his gas works were out of order; that during the evening of the day last referred to the pris-

oner having but recently returned dressed in a broad brim slouch hat, long black coat and pantaloons much soiled, to the Capital Hotel in Dover where he then lodged and boarded, suddenly rose from his seat in the bar-room between the hours of 11 and 12 o'clock that night, and remarked that the hands of the clock in that room moved faster than at his office and hurriedly left it, having just before observed that his resort was leaking, and he was afraid of an explosion; and in about an hour afterwards the keeper of the adjoining saloon was awakened in his bed by a cry of fire, and heard the crackling of the flames in the prisoner's rooms, and on breaking in with the assistance of another the front doors at the foot and at the head of the stairs, both of which were locked, and entering his front room they found the windows of it fastened down, and the door of it which they had just broken in, on fire and a very large dry-goods box placed against the door between it and the back room also on fire, the front room filled with stench and smoke, and on the burning box with some paper and rubbish saturated with coal oil under and about it, a human body without a head, feet or hands, entirely skinned and also saturated with coal oil. The wrists and ankles were broken and crushed where the hands and feet had been severed from it; and four or five feet from it in a hole bored in the floor of the room, but which the fire had not reached, about a half a pound of gunpowder folded in paper funnel-shaped had been placed with some loose paper saturated with coal oil about it. A hatchet and a heavy iron bar fourteen or fifteen inches in length were also found in the room. But without making further material progress the fire in it was speedily extinguished. That at 4 o'clock that morning the 4th of Dec. 1872, the prisoner entered the rear car of a railroad freight train with a passenger car attached from Wilmington to Delmar at the Dover station, stating to the conductor of it that he was from Little Creek Landing and was going to Norfolk; but he had no other baggage than a small rolled bundle tied round with a piece of rope, and that he sat in

one place through to Delmar with the collar of his coat turned up and the rim of his slouch hat drawn down over the sides of his face and his head inclined forward, as if he wished to avoid recognition by any one, and left it at that place where the train stopped. He voluntarily returned, however, in the afternoon of the following day, to Harrington, where he enquired for a constable and said in the presence of several persons at the railroad station there that he was Isaac C. West and wanted to be arrested, and when he was asked what for, stated that he had stabbed and killed a negro and that he did it in self-defense, and when asked why he had done it, said that he had employed him to do some work and when he was in the act of paying him for it, he took up a hammer and threatened to kill him, and he then took up an iron bar and struck him with it and killed him. He was then told of the fire in his rooms at Dover, and was asked if he knew any thing about it, when he said he had arranged that it should burn before he left there. He was not arrested, however, at Harrington, but the same afternoon voluntarily entered a railroad train there, came to Dover and surrendered himself into the custody of the sheriff of the county.

The Coroner had not then concluded his inquest in the case, and the prisoner having requested of him permission to make a full and free confession was brought before the jury, and in the presence of the coroner and the jury after being duly admonished that he was not bound to criminate or bear evidence against himself, made the following voluntary confession which was reduced to writing by the secretary of the coroner, and after being read over to the prisoner was approved and signed by him.

My name is Isaac C. West, Jr.; will be thirty years of age the 29th of next May. I am a native of Sussex County; have been in Dover and about there for several years. Do not claim to be a physician. I have been administering gas for the treatment of diseases. On Monday morning, December 2d, I was taking a bucket of water up to my

room. Turner came along, and said "Boss, I'll carry that up for you." I told him I'd carry it up myself; but that I had some work for him to do. He said he would do it, and wanted to know what it was. I told him I had a large box at Capt. Battel's which I would like him to bring around. He said he could not carry it around then, that he was cutting up meat for Mrs. Mullen, but said he would do it sometime in the afternoon. I went to Mrs. Mullen's about one o'clock; there were some colored men there who said Turner had not been there and they did not know where he was. I met him on the street about three o'clock; he said he was ready to carry the box for me; he got a wheel-barrow from Mr. Collison and took the box up to my room for me. My room is in Kirbin's building. I took out my pocket-book and paid him twenty-five cents. He said "boss you seem to be pretty flush." He said won't you give me a drink, or something to get a drink. I said I would if he would go down to the bar next door. He said then, after he got his supper, he would come back and get water to fill my gasometer, that he would not charge me anything for that as I was so good to him. We went down together and I paid for Turner's drink at Levy's bar. Sun was then about half an hour high. We came out together, then separated. As we came out of the door he said "boss, I'll be on hand in about half an hour," or by "sunset." I met Turner again between that time and sunset, near the post office. He said he was ready to go and take the water up. I told him I was not ready then to go to the room. In a short time after that I met him near Hoffecker & Stewart's store; he was talking with some colored man. I passed him and went on up to my room, in Kerbin's building. I had just got there and unlocked the door when Turner came up. I went on up stairs ahead of him and unlocked the room door up stairs and went in ahead of him. I had taken my gasometer to pieces that day, intending to fasten a small sledge hammer I had taken there to the weights. This sledge hammer was sitting just inside the

door. The other weights were over in the corner about eight feet further on. One of the weights was a bolt, or piece of an axle. It was about two feet long and about an inch and a quarter in diameter. I had just got about where this bolt was sitting when I turned and saw Turner with the hammer in his hand. As soon as he saw I saw him, he said: "Give me your pocket-book or I'll kill you." I snatched up the piece of axle. Just as I did so he struck at me with the hammer. He struck me on the top of the hat, dinting the hat in but not touching my head. I was stooping over. I struck at him with the bolt or piece of axle, intending to strike him on the head, but missed his head and struck him on the neck, below the ear. He fell, and I don't think he ever breathed afterwards. This was just after sunset. He fell over on his side. I then felt of him; felt his pulse and found that he was dead. I did not intend to kill him, but only to knock him down, so that he would not kill me. I left the body lying there. Came and got my supper at Mr. Fountain's hotel. I did not go back any more that evening. I went back again on Tuesday morning about 10 or 11 o'clock. I then thought I would cut him up in pieces and carry him off and bury him. I cut off his head and feet, and skinned the body. I did it with a penknife, having previously broken several of the bones with the bolt or piece of axle. I came up to Mr. Fountain's for dinner. This was not all done before dinner. I do not remember how much I did do before dinner. Had no fire in my room. Do not know the exact time I went to dinner. Did not go there any more that afternoon. Don't remember positively whether I went back or not in the afternoon. That afternoon I got a horse and carriage from Mr. Fountain and went out to Hazletville, thinking it would be dark when I came back and I could take the remains away. It was dark when I got back—about 6 P. M., Tuesday. I brought down the skin of the man in a water bucket; had a piece of paper over top of the bucket, which was about full. The horse smelt it and would not let me take it. I set it down just

inside the outer door and locked the door. I then took the horse and carriage to the stable. I went to the hotel and warmed myself. I then thought I could carry off the remains in a bucket and bury them. I got my supper at Hazlettville. I went to the room about 8 o'clock. I then took the bucket that had the skin in it and started out on the street with it. Had not got far before there were two dogs after it. I went out Loockerman street and through the new street recently opened as a continuation of New street. Found the ground frozen and I had nothing to dig a hole with. I then turned and brought it back to my room again. I then remained in my room awhile thinking what to do. I concluded I would tear the large box I had there to pieces and make a box that would hold the remains and ship them on the railroad to some point, and follow them and bury them. I found it was getting late, and that I could not stay any later that night. I then came to the hotel and went to bed, and suppose it was about eleven o'clock Tuesday night.

On Wednesday my foot was hurting me and I did not go back to my room early—suppose it was as late as nine o'clock when I went there. I found the remains smelling so that I was afraid to ship them on the railroad. I was about at different places in the town during the day until the afternoon. Got my dinner at the hotel. I went back to my room about 2 o'clock. I took my knife and cut some pieces of flesh from the remains—about the abdomen. I cut the lips and nose off the head. I struck the head with the bolt or axle. I am under the impression that I struck it before cutting the nose and lips off, intending to mash the head up so it would not be recognized. Could not make any impression on it. It was my intention to skin the head—but thought if I only skinned it it would be recognized. I put the head in a bucket and took it out to a lime heap near the railroad. Emptied it out, put some lime in the bucket and raked the head back into the bucket and carried it to the place where I buried it—I had a spade I found leaning against Mrs. Jones' out-

house. I buried it under a heap of dead briars, near the corner of Water street and the railroad. I went back to the room about ten o'clock at night, had a candle and two lamps in the room—one lamp for alcohol and the other for burning kerosene. I took the bucket and put the skin in it to carry it away. I went out on the street with it; saw some one coming and took it back into the room again. I melted some tallow off the candle and stuck the candle up on the floor. I then took one of the feet and poured alcohol over it and set fire to it. I wanted to see if the alcohol would change the color of the skin. I spilt some alcohol on the floor; that also caught fire. I had that night, before doing this, piled up the box and pieces belonging to it over the body. I intended, if the alcohol did change the color of the skin on the foot, to throw the skin of the body on the floor and change the color by burning alcohol on it. I found the burning alcohol did not change the color of the skin. I intended, if it did, to put the skin back on the body and fit it as well as I could. When the alcohol on the floor caught fire I gathered up the feet, hands and skin in my hands and got out of the room as soon as I could. I tried to fan the fire out. Turner had knocked over a can of kerosene that was sitting on the box on Monday. I walked toward the Methodist graveyard with these things in my hand. After I had got off a considerable piece from the house, I saw that the fire had gone out—did not see the lights burning. I started to go back to the room again—was afraid to go back knowing that the candle was sitting on the floor burning. I had gotten up near Mrs. Jones' new house when I saw the fire flash up again. I then turned, went back towards the graveyard, where I had left the hands, feet and skin. I took them up and carried them over into the Methodist graveyard and waited there until the fire was put out. I then went and buried the skin alongside the railroad. I started up to get the hands and feet to bury them when I heard the whistle of the 4 p. m. down train. Raked some lime over them, went up to the depot and waited until the

train came. I got on board the train with a bundle of clothes and went to Delmar and walked down the railroad track to Salisbury. I had taken the clothes out before and hid them. I went to Tracey's hotel in Salisbury and remained there until this morning, (Friday,) then got on the train and came up to Farmington. Got off the train at Farmington. I then walked up to Harrington and got on the evening train and came to Dover and delivered myself up to the Sheriff, who was at the depot. While at Harrington I called for a constable, intending to surrender myself.

My life is insured to the amount of \$25,000—\$10,000 in the New England Mutual, \$5,000 in the John Hancock, \$5,000 in the Ætna, and \$5,000 in the Delaware Mutual—about one-half of this amount is in favor of my wife and the balance for self. The policies are all paid up and alive. Took out the Ætna policy five or six years ago—the others last spring.

I never had any difficulty with Turner—had no enmity against him—knew him only by name—never having exchanged words with him until that day—thought his name was Joe Turner—had axle in both hands and struck him on the right side towards the back of his neck. One blow was all I gave him—that killed him—don't think he ever breathed after I struck him. I felt his pulse as soon as I could compose myself—it had ceased beating. I had some powder in a place where I had bored a hole to fix a post. I took the powder out of the desk and put it in there. I upset a lamp on the desk once, and thought that it was a dangerous place for it. Kept a board over the hole. Bored the hole about a month ago with a brace and bit I borrowed of Captain Battell or Fred Croyden, I don't know which. I made the hole for the purpose of settling a post in it to hold my retort. In making the hole missed the joists and the hole did not answer my purpose. There was nothing in the room to explode.

The bundle of clothes I took on the cars with me contained a circular cloak, a coat, a pair of boots, and three

shirts. I bundled them in my room, at Kerbin's building. I took them out about 10 o'clock Wednesday night to the back of Holland's store, and left them in the graveyard until I heard the train, when I got them and took them to the platform. The clothes are now at the Dover depot, in a bag I bought at Salisbury. The blow I gave Turner broke his neck. I tore Turner's clothes up in strips so that they would not be recognized—they consisted of a coat, a pair of pants and a shirt—cut the uppers off the soles of his shoes. Threw the soles out on the street, left the uppers with the torn-up clothes on the bench, intending to carry them off and bury them. The front shutters of the windows were closed when I left. I was afraid to go back to the room on account of the gun-powder.

The portions of the body were soon afterwards found in the places detailed and described by the prisoner.

The prosecution, after the reading of the confession in evidence, called, among other witnesses, Frederick Windolph, a citizen of Dover, who testified that the prisoner came to his place of business several times; the first time about the time he rented his rooms, four or five weeks before the killing of Turner, when he was looking for a room to rent, and afterwards enquired for him when he was not in. The second time was at his place of business, about a week before the killing. They were pretty good friends, and that time he came in about dark, and talked about having been down to his father's, and the weight of himself and his brothers who had been weighed while he was there, and said their average was about two hundred pounds, and then he asked him (the witness) how much he weighed, and he told him about a hundred and eighty pounds. He next asked about his height, and they were then measured by another person, and the prisoner then placed his hands on the witness' chest and said they were about the same size, but he was the tallest by an inch and a half, while the prisoner was the largest round the chest; and that the prisoner asked him at two different times to visit him at his rooms, and once stopped him on the

street and said to him he wanted him to come to them.

An agent of a Life Insurance Company was then called and sworn as a witness, and was asked the question, what would be the annual premium upon a policy of \$25,000, on the life of a person twenty-nine years of age?

W. Saulsbury, for the prisoner, said he did not care to raise the objection or to discuss the question, but would ask the Court if the enquiry propounded to the witness was admissible?

Lore, Attorney General. We propose and expect to show that the life insurance policies already mentioned, constituted the motive of the prisoner for the deliberate murder with which he stood charged in the indictment.

Gilpin, C. J. It is competent to prove that the prisoner had a motive for committing the crime with which he stands charged.

The witness then answered that it would be about \$25 per year on a \$1,000 policy, and at that rate on a policy of \$25,000, or about \$600.

The testimony on behalf of the prisoner was, that his father had been of unsound mind for a period of about three months in the year 1836, and that the prisoner when sixteen or seventeen years of age fell from a load of fodder on very hard ground and was insensible for awhile and sick for some time afterwards; and that whilst he was at school in Dover in the year 1869, he walked all the way from there to his home in Baltimore hundred, and said he had been out two nights on his journey, one of which he spent in the woods, and the other in an old tent near Millsboro, and that he had not been at or in a house since he left Dover. The reason he assigned for it was that he had dreamed that his mother was sick, and a lady at the house where he boarded had dreamed the same thing, and the first remark he made to his mother on entering his home, was that he expected to find her

sick and in bed. He had also when a boy suffered a severe fall from a swing, and was sick and fainty for three weeks afterwards, and complained much of pain in his head and back; and last summer while on a visit to his father's in Baltimore hundred he acted strangely, and on the Sunday during his stay there got two cats, washed them in water and hung them up in a basket to dry. In the latter part of the year 1869, he applied to an acquaintance in Baltimore hundred for a very old newspaper which he had in his possession containing the inaugural address of President Jefferson, and when asked what he wanted it for, replied that he wanted it for a museum which he was going to start in the town of Milton in that county. The same person saw him next at a basket meeting in Worcester County, Maryland, in August last. He drove up in a horse and wagon with his wife and child, and after hitching his horse, he got in and out of the carriage twenty-five or thirty times in the course of two hours and a half. He would appear each time to do something to the horse or harness, although neither seemed to require anything at all to be done to them. The same witness next saw him in September following, at a political meeting in Georgetown, Delaware, where he acted strangely, and had a dog with him, and when he asked him what he was going to do with the dog, he replied that he was going to present him to General Grant; and said it seriously.

Another witness, Dr. John O. Pearce, stated that he had been intimately acquainted with the prisoner several years and had first observed a marked change in him in the fall of 1872. At that time he went with him by his request in a private conveyance from Milford to Georgetown. He was then going there on his gas business, and was about to purchase the fixtures for it. The witness also detailed several particulars in regard to his change of manner and his conversation on their ride back to Milford, which constrained him to feel like avoiding him in future, and that he would not like to be alone with him again, as he then was, and that he then came to the conclusion that his mind was unsound and disordered.

Another witness who had been several years ago a pupil of the prisoner when he was a teacher of a public school in Milton, Delaware, testified to his strange taste and passion at that time for unique or curious things of no value, even as curiosities, and of digging for human bones, and his catching, killing and dissecting frogs, and of his collecting such common things in the neighborhood for what he called his museum; and several other witnesses followed, who also testified to their long and familiar acquaintance with him, and to the striking change which they had observed in his appearance, character, conversation and conduct prior to the occurrence in question; whilst on behalf of the State they were met with the counter testimony of a number of other witnesses who were also well acquainted with him, who had observed no such change in him, but, on the contrary, had always regarded and considered him of sound mind.

During the production of the evidence on behalf of the prisoner, and among the last of the witnesses called and examined by the defense, was Thomas Battel of Dover, who testified that when the prisoner removed from Dover to the city of Baltimore, he packed up his things in a large dry-goods box, and among them the articles he had been selecting for his museum, and when he returned here from Baltimore last summer, he brought the box back with those articles in it, and left it at his shop in his charge, where it remained until the 2d day of December last, when the deceased carried it from there in a wheelbarrow to the prisoner's office on Loockerman street. Before that was done the prisoner had applied to him to make him a table for his office, when he suggested to him that he had an old table that could be soon repaired which would answer his purpose, or what would be still better, he could take his box then there, which would serve the double purpose of a table, and for the storage of such rubbish as lay around his office. The prisoner approved of his suggestion, and had the box emptied there of its contents and taken to his office, as before

stated, but some of the old papers and pamphlets which were in the box were taken away with it.

The counsel for the prisoner now applied to the Court for leave to produce before the Court and jury the collection of articles which had then been removed from the box and left in the shop and possession of the witness.

The Attorney General objected to the leave asked for, as entirely novel and unprecedented, and unwarranted by any rule of evidence or practice in criminal cases.

But the Court, after deliberation, granted the leave and ordered the articles to be produced.

They consisted of a few snakes preserved in bottled spirits, insects, odd-shaped stones, buck-horns, an old shoe and an old umbrella, and a frame mirror badly fractured, together with a variety of other articles of no novelty, and as common as valueless, even as curiosities.

The witness, when further examined in regard to them, stated that he found the old shoe in the box carefully wrapt in paper, and with a sheet also wrapped about it, while the looking-glass, which had cost considerable money, had been put into it without any thing about it to protect it from injury, and which had been very much cracked and broken in the box; and when he laughed at the prisoner for taking so much care of an old shoe, and none of the looking-glass which was of some value, he replied that he would part with his right arm sooner than he would with that shoe. He then told the prisoner he was a crazy man. The prisoner had several times talked to him about his museum and about his gas, and his sanguine expectations of making a fortune out of it, and he had pronounced him to be a crazy man in his opinion some time before the killing of Cooch Turner.

Bates, Deputy Attorney General. The killing of the deceased by the prisoner at the bar was murder with express malice aforethought, and of the first degree under the statute, or it was no crime or offense whatever in con-

temptation of law, horrible as had been his efforts by the mutilation of the dead body to conceal and falsify the identity of it, from the time he committed the act, until he fled from the scene of it; and until soon becoming conscious of its enormity, and that it could no longer be hidden from all eyes but his own, he concluded after his escape beyond the limits of the State, and a full day and night's reflection on it, to return to the locality of it, surrender himself to the Sheriff of the County, and to make a free, deliberate and voluntary confession of it before the Coroner's inquest, which was then still engaged in the investigation of the homicide, and which at his own instance and request was so made by him, and was reduced to writing and read to him by the secretary of it, and was then approved and subscribed by him.

The defense which they were to meet in the discussion of the case before the Court and jury was of a two fold character. As alleged and presented by the prisoner himself in his confession, it is self-defense, merely, that is to say, that he killed the deceased, which he admits, in self-defense against a sudden, unprovoked and imminently dangerous assault made upon him by the deceased with an uplifted hatchet, and which, whether true or false, is at least rational on his part; for whether true or false, it certainly exhibited soundness of mind, reason, judgment and reflection of a pretty high order on his part, to conceive and assume for himself, without the aid or advice of legal counsel, such a ground of defense in the case. The other defense which has since been raised, was an after-thought, and has also been adopted and espoused by his counsel, which is that of insanity, the last desperate defense now generally made and relied on in all desperate cases of willful and deliberate murder which cannot possibly admit of any other, even specious defense, than that, the last refuge of a guilty murderer. They were evidently inconsistent, however, with each other, and could not stand together; for it was impossible to believe that if the prisoner was in fact insane when he killed the deceased,

he could have been actuated and justified in doing it by such a sane and rational motive as that of self-defense, as the same is defined in the law on that subject. The defense of insanity, therefore, in effect, contradicts and denies the defense of the prisoner as made by himself in his confession, that is to say, that he killed the deceased in self-defense against a deadly assault made upon him by the deceased. Indeed, the confession itself is wholly and utterly inconsistent with the defense of insanity which has since been set up in the case; because it would otherwise involve the necessity of imputing to it a rational motive for the act.

There could be no doubt that the dead body found, though skinned, disfigured and horribly mutilated otherwise, was the dead body of Cooch Turner, and that he was the victim of the homicide now under consideration, and that he was killed by the prisoner at the bar. That was clearly established by the written and voluntary confession of the prisoner taken by the coroner at the inquest, and confirmed by the finding of the several portions of it where he had buried and concealed them unknown to any other person, and where he had voluntarily directed them to be searched for. His confession with that corroboration conclusively establishes that fact beyond any doubt whatever. But, although the whole of the confession, and every declaration or statement contained in it, as well those which are in his favor, as those which are against him, are in evidence before the Court and jury in the case, and must be taken into consideration by the jury, it is now a well settled principle of law that the jury are not bound to believe what he says in it in his own favor to be true, because the confession has been put in evidence by the prosecution on the part of the State, but you are to consider and weigh such portions of it with all the facts and circumstances proved in the case, and determine after doing so, whether you believe it or not; for it is equally well settled as a principle of law, that the jury may believe one part of the

prisoner's confession or admission, and disbelieve another part of it when it is so put in evidence against him. They may believe that part of it which charges, or makes against him, and discredit and reject that part which makes in his favor, if they see sufficient grounds in the whole proof in the case for so doing. In such cases in determining whether the part in the prisoner's favor be true or not, the jury must consider whether it be probable or improbable in itself, or whether it be consistent or inconsistent with the other facts and circumstances proved in the case. If what the prisoner has stated in his confession in his own favor, is not contradicted by the evidence otherwise produced by the prosecution, not improbable in itself, it will naturally be believed by the jury; they are not, however, bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances in the case. 1 *Arch. Cr. Pr. & Pl.* 410, and the cases cited in the notes thereto.

Now, as to the probability of the statement of the prisoner that the deceased made a sudden and dangerous assault upon him, and he killed him in self-defense in the manner alleged in his confession, can any one possibly believe on his statement merely that an inoffensive, drunken negro who loved liquor as well as Cooch Turner unfortunately loved it, and who had just been generously treated by his employer, the prisoner, to a full glass of raw brandy, would or could so soon afterwards in the prisoner's own office with houses immediately adjoining it on either side and occupied by neighbors so near at hand, even think of making a deadly assault on such a stout, athletic and perfectly sober man with a view to rob him of the money he then had about his person, under such circumstances and in such a situation? It would seem improbable and incredible in the highest degree, and past the belief of any reasonable mind, even if there were nothing in the facts and circumstances and in the action and conduct of the prisoner afterwards in regard to the matter, as proved in the case, to impeach and dis-

credit the truth of the statement. If that was so, why did he prolong his laborious efforts for several days and nights in secrecy and silence to destroy, not only the color and skin of his victim, but even the last vestige by which the body could ever be discovered to have been that of a black, instead of a white man? And why after the skin, head, hands and feet had been severed from it and removed to the places where they were afterwards found by his information, were such particular preparations made by him to burn the residue of the body in his office, and his last act in the shocking and revolting tragedy, was to deliberately set fire to the room and building in which it lay for that purpose, and steal secretly and silently away from it in the darkness of the night to a safe and secure position where he could observe unseen the progress of the flames which he expected every moment to see burst forth from it; and when that last hope and expectation had failed him, why did he then steal as secretly and silently away from the scene at 4 o'clock in the morning with a falsehood on his lips and disguise on his person to that early train, and flee like a criminal and a fugitive from justice into another State? Could all this have been done, and could such have been the course which any man of the prisoner's nerve and intelligence would have pursued, who was honestly convinced in his own mind that he had killed a negro robber in lawful self-defense?

The State will contend that all these facts are not only utterly inconsistent with any such statement or pretension, that the killing was done in self-defense, but that they clearly indicated a purpose and intention on the part of the prisoner to do more than merely to murder Cooch Turner; and that was by means of his dead body thus horribly mutilated and disfigured by him, to accomplish another and ulterior object, then so near and dear to his wicked and avaricious heart that he was even capable of doing all this in order to attain it. For it is upon these acts and the evidence afforded by his confession in relation to the aggregate insurance of twenty-five thousand

dollars on his life in the life insurance companies mentioned in it, the State confidently bases the charge against the prisoner that he deliberately murdered the deceased, and then as deliberately skinned and mutilated and disfigured and attempted to burn so much of the trunk of it as could be consumed in that manner, by setting fire to the room and the building in which he left it, in order that such remains of it as survived the burning of the building might be mistaken for the remains of his own body, in the melancholy belief of an unsuspecting public that his own life had been unfortunately sacrificed by a supposed accidental explosion of his gasometer, and had been so far consumed in the burnt building, which was to be fired for that purpose also, as to be past all possible recognition as the remains of any body else when found; and to consummate the plan of this atrocious design, his further purpose was forthwith to disappear unseen forever from this place, and from the sight of all persons if possible, who had ever before known him. And to show how near he came to the successful accomplishment of this wicked and diabolical scheme of combined fraud, villany and murder, such was in point of fact the general, if not the universal impression in the town of Dover that morning, as soon as the fire in the room and the finding of the dead and then unknown body in it, became known in the community. And that the first and last and only motive of the murder, and of his subsequent steps with regard to the body was his hope and expectation that such would be the unquestioned assumption and belief every where and that the money payable on his life insurance policies could, on the presumption of his death, be obtained by his executor, or his executrix without much delay; and, particularly, without having to pay any more premiums upon them, or else forfeit them entirely, and which he was now finding it impossible for him to do, if he did not know it when he increased the amount of them to \$25,000 and the annual premiums to be paid by him on them to \$600, but a short time before this atrocious step was taken by him.

As the law presumes a man to be sane until the contrary appears, it imposes on every one who seeks to avail himself of the defense of insanity in either a civil or criminal prosecution against him, the *onus* or burden of establishing such defense to the satisfaction of the jury, and unless it satisfactorily appears to them from the facts and circumstances proved, and all the evidence before them in the case, that the accused was insane when he committed the offense charged against him, and there is no other or better defense established in the case, it is their duty to convict him of it. And as to the condition and degree of unsoundness of mind which the law requires to be shown to the satisfaction of the jury in order to establish the defense, the legal rule and criterion is that if the accused had at the time of committing the offense charged, sufficient soundness of mind, reason and reflection to be able to distinguish between right and wrong in reference to the act itself of killing the deceased, and the power to choose whether he would do it or not, he is held in law criminally responsible for it; and if that appears to the satisfaction of the jury, no peculiarity of taste or habits, no eccentricity of character, or strange or striking change in his appearance, conversation or conduct, and no defect of moral sense or perception, or in the ordinary instincts of our common nature and humanity, and even no weakness or unsoundness of mind can suffice to exonerate him from his criminal liability for the offense. 1 *Arch. Cr. Pr. & Pl.* 20, 37, 38. 2 *Greenl. Ev. Secs.* 372, 373. *State v. Windsor*, 5 *Harr.* 538, 539.

W. Saulsbury, for the prisoner. The character of the accused from his youth up to the occurrence on which the prosecution is founded for the crime of murder of the first degree, was without a stain, and it would be hard to believe without the strongest proof of the fact, that the first offense of such a person could be a crime of that degree. The counsel for the State however seem to have mistaken the nature of the defense which would be

relied on in the case, and to consider it, as if he had confessed that he killed the deceased and pleaded specially the matters of defense relied on by him, which he would be bound to prove to the satisfaction of the jury beyond a reasonable doubt in order to avail himself of the benefit of them. But such was not the case presented on the record before them. For the only plea in the case is, not guilty, and that, on the contrary, imposed the duty on the State of proving him guilty of the crime with which he stands charged, to the satisfaction of the jury beyond a reasonable doubt.

The prisoner at the time of the homicide had so little acquaintance with the deceased that he did not even know his name, but called him Henry, instead of Couch Turner, and he therefore could have had no malice or enmity against him prior to the provocation and deadly assault made upon him as stated in his confession. And the important fact here presents itself for the consideration of the jury that but for that confession voluntarily made by him, neither the Attorney General, or his deputy, or any one in this community even, would have known who it was the prisoner had thus killed, or where the missing portions of his dead body were to be found. Indeed, there was not a single fact or circumstance in the case of any material weight or importance to the State in the prosecution of it, that was not communicated and disclosed by the prisoner himself; and which he voluntarily returned into the State after having passed a short distance beyond the borders of it, to make fully known to them. And here he would remark to the jury that in consideration of this fact, it would become their grave and solemn duty to give proper weight and effect to the whole and every part of the confession, as evidence in the case produced by the State itself, to that which was favorable to him, as well as to that which was against him; for they could not, at their mere will and pleasure capriciously or arbitrarily discredit or reject any part of it, or any statement in it, as unworthy of belief, and credit

only so much of it, as without such statements, would suffice, perhaps, to convict him of the crime with which he stands charged. All parts of the confession, must therefore, be taken and considered together by the jury, as one statement, complete and inseparable into parts. And more particularly was that the rule of law on the subject, when the confession constitutes the only evidence on which a conviction can be had. The jury, were therefore, bound to consider the statement contained in his confession that he killed the deceased in self-defense against a deadly assault made upon him by the deceased with the intent to rob him, as much as the statement and admission which it contains that he killed him, because it was part and parcel, and a qualification of his statement and admission that he killed him; and in the consideration of his confession which was the only direct evidence before them on that most material point in the case, they could not be disconnected or separated from each other.

But one of the first and perhaps, best definitions of the crime of murder we have in the books is given by *Coke*, 3 *Inst.* 47, and which according to his description is when a person of sound memory and discretion unlawfully kills any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied. And by it you will observe that the first thing required in law to constitute the offense is that the person who unlawfully kills another should be at the time of sound memory and discretion, or in other words, of sound mind and competent understanding to be criminally responsible in law for it. And this soundness of mind, memory and discretion it is just as indispensably necessary for the State to prove on every indictment for the crime, to the satisfaction of the jury beyond a reasonable doubt, as it is to prove the act of killing itself; and when the *prima facie* presumption of sanity, or soundness of mind is rebutted by sufficient evidence of insanity, to raise a reasonable doubt in the minds of the jury as to the sanity of the prisoner at the time of committing the act, the burden of

proving his sanity to their satisfaction beyond a reasonable doubt, rests on the prosecution. Because the *prima facie* presumption in law that he was then of sound mind, is at least counterbalanced, if not over-weighed, by the legal presumption of his innocence which still remains in the case. *Smith v. Commonwealth*, 1 Duv. 229, 328. *Commonwealth v. McKey*, 1 Gray 61. Although the rule of law on this point in civil actions is different, in which there are no presumptions either way, but the preponderance of the evidence prevails; while in actions *ex delicto* the burden of proving insanity rests on the party who alleges, or sets it up in the suit. 39 N. H. 171. 40 Ver. 556. 31 Ill. 393. And the sanity of the prisoner at the time of committing the act was as much involved in the question of his guilt or innocence in the case, as was his intention to commit it. 19 Maine 398. 26 Maine 317. 24 Pick. 373. 50 Maine 345. 24 Pick. 373. 43 N. H. 224. 16 N. Y. 58. 40 Ill. 358. 17 Mich. 9, 20, 21.

He then remarked that although he was aware that they were not entitled to the weight of judicial decisions or legal authority, he would present the views of several scientific writers of acknowledged learning and ability on the subject of insanity, and read at considerable length from *Abercrombie's Mental Philosophy*, and from the works of *Ray*, *Richards*, and *Tayler* on *Medical Jurisprudence*, to support the defense of insanity in this case, and on the evidence produced to sustain it.

As to the measures adopted by the prisoner to destroy and dispose of the body after he had killed the deceased under the circumstances detailed in his confession, and for the sole reason and purpose stated in it, which simply was to effectually destroy all the evidences of the act which he had just committed, it was not only a part of his confession which the State itself had put in evidence for the purpose of convicting him of the crime of murder contrary to the whole tenor and import of it, and which must be taken and considered by the jury in connection with every other part of it, and particularly, with his ad-

mission contained in it, that he killed the deceased, but it certainly presented a much more reasonable explanation, and a much more probable account of the matter, than the purely imaginary and hypothetical reason and motive which the prosecution had ventured and presumed in the absence of any direct evidence whatever on that point, to assign for it. For had the motive and object of the prisoner been such as the prosecution confidently assumes and contends it was, and he had been so long meditating and maturing in his mind the design and the plan of its execution imputed to him, how much more feasible and safer would it have been for him to have procured at a comparatively trifling expense from the adjacent cities of Baltimore or Philadelphia, some unknown dead body of a different race and complexion, which would not only have suited his purpose much better, but would have saved him from the awful sin, crime and danger of deliberate murder? The mere theory and hypothesis of the prosecution that the whole thing was contrived and planned, designed and executed in such a manner after weeks and months of consideration and preparation for it, for the purpose of defrauding the life-insurance companies mentioned in the method proclaimed by the Deputy Attorney General, was therefore so improbable and incredible under all the facts and circumstances proved in the case, that he would leave it to them without further comment on the subject.

Lore, Attorney General, replied, that the killing of the deceased by the prisoner at the bar being proved as a fact, and not disputed in the case, the burden of proving to the satisfaction of the jury that it was done by him in lawful self-defense rests on the prisoner, and his own declaration or statement that it was so done, though made in his written confession, and then before the jury, was not evidence of it. It is a special plea or defence in confession and avoidance of the act of killing and its legal consequences, set up by the prisoner himself under the plea of the general issue of not guilty, the only plea in bar ever

pleaded in cases of murder; and it was incumbent upon him to prove and establish the truth of it to the satisfaction of the jury beyond a reasonable doubt, or it must entirely fail him as a defense in the case. And the same was the case with regard to the other and wholly inconsistent plea or defense of insanity, for the same rule of law and special pleading, or of setting up a special defense equally applied to it. For the law presumes every man to be sane, and to have sufficient knowledge and understanding to be legally responsible for the crime of unlawfully killing his fellow man, until the contrary satisfactorily appears; and therefore the accused to make good and establish his special defense on the second ground, was bound to prove to the satisfaction of the jury that he was insane and of unsound mind to such a degree that he was incapable of distinguishing between right and wrong in relation to the act of killing the deceased at the time when he committed it, and had not the ability by an effort of his will and understanding to choose whether to do it, or not to do it. There are various forms and degrees of mental derangement or insanity, but that is the true and only test established in law to determine the measure and degree of it in all cases of homicide that will suffice to exonerate the accused from criminal responsibility for it. 1 Arch. 37. *Commonwealth v. Rogers*, 7 Met. 500. *State v. Bartlett*, 43 N. H. 224. *State v. Windsor*. 5 Harr. 512. And on that point it was sufficient merely to remind the jury that the steps immediately taken by the prisoner, and secretly prosecuted by him, through several days and nights, to destroy the body of the deceased, in order to conceal the homicide, as he alleges in his confession, utterly negatives the absurd pretension that he was insane, and he did not know, or fully comprehend the nature and criminality of it.

The confession of the prisoner being judicial, as well as deliberate and voluntary in its character, and taken before the coroner, was the strongest species of evidence that could have been produced against him; and although,

the whole of it should be taken and considered together by the jury, yet no principle of law was better settled than that it is not to be supposed or understood by the jury that every part of it is necessarily entitled to equal credit and belief for that, or any other reason; but they may believe one part of it, and disbelieve another part of it, and may credit that which charges him, and discredit and reject that which is favorable to him, if all the facts and circumstances in evidence before them should lead their minds to that conclusion.

What could have been the motive and design of the prisoner in mutilating the body of the deceased to the extraordinary extent proved in the case, and admitted in his confession, and of removing the skin from it, and of his experimental effort in the first place by the means of coal oil to change the color of it from that of a black to that of a white man, the severing of the head, hands and feet from it, and carrying them off and concealing them at such a distance from the building in which the act was committed, while all the rest of the body was retained by him for so long a time, and until the room in which it was kept and the box on which it lay were set on fire by him at the moment of his final departure from it? Could all this waste of time and effort in such a labor have been the work of a man who had killed another in lawful self-defense, or in a state of momentary insanity even? Or of one who on recovering his self-possession, or his reason and reflection immediately afterwards, was only seeking to efface and destroy the evidence of the act in order merely to escape detection and to conceal it effectually from the eyes and the knowledge of every person but himself? On the contrary, did it not clearly indicate and denote a fixed and settled design and purpose on the part of the prisoner still worse and far beyond that? And taken in connection with the facts and circumstances proved in the case, the late extraordinary increase in his life insurance policies, his still later removal to Dover from the city of Baltimore, the peculiar business he here

engaged in, and its liability to explosion according to popular apprehension, and that the owner and operator of it would in all probability become the first and only victim of such a fatal catastrophe, and be consumed almost, if not entirely, beyond recognition and identification by even his most intimate friends and acquaintances, with the burning building and all his gas apparatus which would in that disastrous event perish with him, but leaving just enough of his mortal remains unconsumed in the general conflagration to satisfy the community and the insurance companies that he had lost his life in that unfortunate manner. And to insure against any possibility of Couch Turner's remains failing to be mistaken for his own when the building should be burnt and the mournful search should be made for what might be left of his, all this mutilation of the body of the deceased was deemed necessary by him, and was therefore done by him. At least, this is the belief and the conviction of the prosecution, and the shocking and horrible facts of this extraordinary and unparalleled case in the criminal calendars of the State, can only be accounted for on this theory or hypothesis, as counsel for the prisoner has termed it, which we have confidently and conscientiously based upon them; and which is certainly much more probable, reasonable and satisfactory than those which he has adopted or rather suggested merely, without even, so much as attempting to account for them. But even, if we are in error in assigning such a motive for these revolting acts of the prisoner, he is none the less guilty of deliberate murder as charged against him in the indictment on all the evidence before the jury in the case.

The Court, Gilpin C. J., charged the jury, that the scientific works on insanity read from by the counsel for the prisoner could not be considered or regarded as legal authorities in the case, except so far as the views expressed in them were sanctioned and supported by judicial rulings and decisions in the trial of cases of admitted

weight and respectability in our Courts of Justice; for without such support they were not properly entitled in the strict sense of the term to the title of works on medical jurisprudence by which they are generally designated, for the term implies so far as the subject of sanity is concerned and what constitutes it in consideration of law, that it has been so recognized and expounded in the judicial decisions of this and other countries, and therefore whatever weight and respect they may be entitled to, they cannot have the weight and authority of established law or jurisprudence on any point discussed or treated of in them, except so far as they are sanctioned and sustained as before mentioned.

On the trial of an indictment for murder, if the accused under the plea of not guilty, the only plea usually entered to such an indictment, sets up the defense of insanity, which admits by necessary implication that he committed the act of killing alleged in it, he is bound to prove, or it must appear from all the evidence in the case to the satisfaction of the jury beyond a reasonable doubt that he was so insane at the time he killed him that he had not sufficient soundness of mind and reason to be able to distinguish between right and wrong as applied to that act, and to understand the nature, character and consequences of it, and had not sufficient mental power to apply that knowledge to his own case, and had not through that knowledge and consciousness the ability to control himself, and to choose by an effort of the will whether, or not, he would commit the act; for the presumption of law is that the accused was sane, and of sufficient mental capacity to comprehend the nature of the act, to know that it was wrong, and to be criminally responsible for it, until the contrary appears to the satisfaction of the jury from the evidence. It was not for the Court to express any opinion upon the weight or character of the evidence on this point in the case, except to say that it is contradictory and conflicting, the witnesses for the State testifying in direct contradiction to those for the prisoner upon it,

and that the opinions of such as thought the prisoner was insane, or not of sound mind at any time referred to by them, should have such weight and consideration with the jury on this point as their intelligence and capacity and opportunities for observing and judging him, and the reasons which they have assigned for their opinions will respectively and properly entitle them to, and no more. And it would be for the jury to consider and determine how far this evidence taken in connection with all the facts and circumstances proved in the case negatives and rebuts the presumption of which we have before just stated, or is inconsistent with that presumption, and if so, whether it shows and proves such a state of insanity or unsoundness of mind and want of reason on the part of the prisoner when he killed the deceased, as to render him incapable of distinguishing between right and wrong with reference to it, of understanding the character and consequences of it to himself, and was incapable through that knowledge and consciousness of choosing by an effort of the will whether he would do it; for unless the jury should be so satisfied from the evidence in the case, the defense of insanity can not be considered as proved and established in the case, and therefore the prisoner could not be acquitted on that ground.

The other ground of defense set up under the plea of the general issue, not guilty, is that the prisoner killed the deceased in self-defense, and which also, of course, admits the killing, and as the law presumes it to have been unlawfully and feloniously done by him, until the contrary satisfactorily appears from the evidence in the case, the burden of establishing that defense to the satisfaction of the jury beyond a reasonable doubt, also rests on the prisoner, unless it otherwise so appears from evidence produced on the part of the State. To constitute a lawful self-defense, such as would excuse or justify the killing of the deceased by the prisoner, so far as any evidence in this case goes, the jury must be satisfied that the deceased made a violent assault at the time upon the prisoner with

a deadly or dangerous implement likely to produce death or enormous bodily injury, and that the prisoner was in imminent peril of being killed or so injured by it, and that without having the time or the means of retreating from or avoiding such an assault upon him, he killed the deceased in repelling it. For if such was the case the killing was excusable and justifiable.

The only evidence before you on this point consists of the declarations of the prisoner himself, contained in his free and voluntary and deliberate confession taken before the Coroner of the County and the jury of inquest in the due discharge of his official duty in the premises, and reduced to writing and approved and subscribed by the prisoner, which invests it with what is termed the character of a judicial confession, and the highest sanction which pertains to a criminal confession in contemplation of law. And as the Court has been asked to charge you as to the weight and effect of it before the jury, particularly, as it was produced and put in evidence on the part of the State, we now say to you that that circumstance can give it no other or further weight or effect in your consideration of it on this point, than it would otherwise be entitled to in law, and that the law on the subject of such a confession when in evidence before a jury on a criminal trial of the party who has made it, is well settled and defined; and it is this, the whole of the confession is to be duly considered and weighed by the jury, but it is not to be supposed or assumed that all parts of it, or all the statements contained in it, are entitled to equal weight and credit as evidence in the case; on the contrary, the jury may credit and believe that part, or so much of the confession as charges the prisoner, or is against him, and discredit and reject that part, or so much of it as is in his favor, or tends to excuse or exonerate him, if they find sufficient ground for so doing on a full consideration of all the evidence, and of all the facts and circumstances proved in the case before them. If what he has said in the confession in his own favor is not

contradicted by evidence produced by the prosecution, or is not improbable in itself, or inconsistent with other statements contained in it, or with all the facts and circumstances proved in the case, it will naturally be believed and credited by the jury; they are not, however, bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances proved in the case.

If either of the defenses made had been proved and established to the satisfaction of the jury upon all the evidence before them, you should acquit the prisoner, otherwise it will be your duty to convict him in manner and form as he stands indicted, that is to say, of murder with express malice aforethought, and of the first degree under the statute.

The jury after five hours' deliberation returned a verdict of "not guilty."

THE STATE V. FRANCIS H. CARTER ET AL.

On the trial of an indictment against several joint offenders, it is not competent for the prosecution, after a witness for the State has answered that he knows only two of them, to ask him the question by what names, and when and where he had known them, because it might in that way indirectly impeach their character.

As to the relative weight and value of direct and circumstantial evidence which are alike admissible in Courts of Justice, neither species is absolutely infallible; nor can the one perhaps, be said to be less so than the other, so far as the results of criminal trials have enlightened them on the subject. But to warrant a conviction in any case on circumstantial evidence merely, it should be such as to exclude to a moral certainty, every hypothesis but that of the guilt of the accused of the offense charged, and that the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with them all.

The crime of burglary consists in breaking and entering into the mansion or dwelling-house of another in the night-time, with the intent to commit a felony therein. And the breaking into it may be an actual breaking, or a constructive breaking, as it is termed in law.

An actual breaking may be by forcing open a door, picking or opening a lock, breaking a window, or taking out a pane of glass, taking out nails or other fastenings, the turning of a key where the door is locked, or the unloosening of any fastening, the raising of a window, or even by the drawing or lifting of a latch; for all of these have been held sufficient to constitute an actual burglarious breaking in contemplation of law.

But breaking by construction of law, or a constructive breaking as it is otherwise called, is where an entrance is obtained by threats, fraud, or conspiracy, as by threats to burn the house unless the door is opened, or where in consequence of violence commenced or threatened in order to obtain an entrance, the owner the more effectually to repel it, opens the door and sallies out, and the felon enters, or where the entrance is obtained by procuring a servant or some inmate to remove the fastening, or when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, or where some trick or artifice is resorted to for the purpose of inducing the owner to unlock or remove the fastening and open the door, and the felon enters, as if one knock at the door on pretense of business, or counterfeits the voice of a friend and the door being thereupon opened, the felon enters; all these and their like have been held to constitute cases of constructive breaking on the trial of indictments for the crime of burglary.

The intent to commit the felony alleged in the indictment is a substantive and material fact asserted in it, and must be proved to the satisfaction of the jury, as much so as the breaking and entry, or any other material fact alleged in it, in order to constitute the crime of burglary.

New Castle County, November Term, 1873. Francis H. Carter, *alias* Francis McDonald, Joseph Lawler, James Thomas, *alias* James J. Watson, *alias* James Hope, and Edward Hurlburt, were indicted and tried for the crime of burglary in breaking and entering the dwelling-house of the National Bank of Delaware, in the city of Wilmington, with intent to commit larceny, on the night of the 7th of November, 1873. The indictment contained four counts, the first two alleging it to be the dwelling-house of Samuel Floyd, the cashier of the bank and then occu-

pied by him as such, and the last two alleging it to be the dwelling-house of the National Bank of Delaware. It was attached to, and part and parcel of the bank building and under the same roof with it, and the cashier entered the bank every morning by a passage from the dwelling-house into the bank. The room of the dwelling-house in which the cashier and his family usually took supper was in the back part of the building, on the first floor of it, with two doors, one leading by a stair-case to the floor next above it and to a passage leading out of the main building by a front door and flight of steps to Sixth street, and a double or folding door opening into the room from a yard in the rear of the building enclosed with a brick wall, and but little below the level of the floor of the room itself. The fastenings of these folding doors consisted of an iron thumb latch which could be raised from its catch either on the inside or on the outside of them, and an iron bolt also on the inside extending partially across both of them when bolted, several inches below the latch, and a wooden bar on the inside placed entirely across them on retiring to rest for the night. By the almanac it appeared that the sun set on that day thirteen minutes after 5 o'clock, and which was proved to have been a very wet and windy day, and that it was followed by a dark and stormy night, and that it was quite dark by half-past 5 or 6 o'clock. About half-past 6 o'clock that evening whilst Mr. Floyd, the cashier, and his wife and two young ladies, nieces of theirs and members of the family, were seated at their supper table in the room just before mentioned and described, a light tapping was several times heard by them against the outside of the double door, which they at first supposed was occasioned simply by the force of the wind blowing against them, until the repetition of it led to a different opinion on the part of his wife and induced him against her admonition, to rise from his seat and to go to the doors to unbolt and open them for the purpose of satisfying her and the ladies who believed and had said to him, that some person was rapping

at them, that such was not the case, but that the sound was produced by the wind merely, and that there was no one outside tapping at the door. He had, however, no sooner reached and unbolted them, and before he had raised his hand from the bolt, when the latch above it was suddenly lifted by a hand on the outside, and the door was instantly pushed open with so much violence as to force him back behind it against the jam, when a tall man masked and followed by four others similarly disguised, rushed into the room each with a pistol in his hand, and commanded silence with a threat to kill any one who attempted to escape from the room, or make any outcry or give any alarm. The last of them to enter, at once closed and bolted the doors behind him, while the first stepped to the other door at the foot of the stairway and closed it and set a chair against it. They then proceeded with a pistol pointed all the while at his head and face, to handcuff him with his hands behind him with steel handcuffs brought with them, while another of them stood with his pistol pointed at the head of his wife as this was being done; but by the time this was completed, one of the nieces who had in the mean while got under the table, succeeded in eluding the vigilance of the one who had taken his station near the other door of the room, and escaped through it and up the stairs to the second floor, and through the passage and the front door into the street closely pursued by one of them, and gave the alarm that there were robbers in the bank, when the prisoners in turn themselves became alarmed and hastily retreated and escaped from the room by the same door by which they had entered it, and from the yard enclosing the premises without arrest that night, but leaving a part of their burglar's tools and implements behind them in the room, and throwing away pistols, gags, handcuffs, masks, and other disguises at various places in the courses of their flight from the bank to a house on the corner of Ninth and Poplar streets in Wilmington, which they had been solely occupying for ten days preceding as strangers

and new-comers in the city. One of the five offenders entirely escaped, but the other four were formally arrested for the offense the next day in the city, and their identity with the prisoners was clearly established on the trial by the evidence.

A witness was called and sworn on behalf of the State, who after stating that he knew only two of the prisoners, Lawler and Hurlburt, was asked the question under what names, and when and where he had known them.

The counsel for the prisoners objected to the admissibility of it. The object of it was evidently, though indirectly, to get in evidence as to the general character of the two prisoners referred to, and which could not be done, either directly or indirectly, until they had themselves put their general character in issue.

The Court sustained the objection, and held that the witness could not answer the question, because neither the names nor the character of the prisoners was now in issue or in question in the case.

Bates, Deputy Attorney General. The ownership of the dwelling house is alleged to be in Samuel Floyd, and that the prisoners broke and entered it in the night time with the intent to steal his goods and chattels, and the second count varies from it only in alleging the intent to be to steal the money, goods and chattels of the National Bank of Delaware; in the third count the ownership of the dwelling house is alleged to be in the National Bank of Delaware, and that it was broke and entered with the intent to steal the goods and chattels and money of Samuel Floyd, and the fourth count varies from the third only in alleging the intent to be to steal the goods and chattels and money of the Bank.

Although the breaking and entering was as early as half-past 6 o'clock in the evening, the proof was that the sun set at thirteen minutes after 5 o'clock that day, that

it was a wet and stormy day, and that it was not only night before 6 o'clock, but that it was very dark and still raining at the time when the supper room of the dwelling house was entered in the felonious and atrocious manner detailed in the evidence. How the entrance was effected and the manner in which it was made had been described by Mr. Floyd and his wife and their two nieces, and seated at that supper table within a few feet of that door, and with that stealthy and ominous tapping, the sounds of which had already awakened their suspicions, there was good reason why every eye should have followed him with the strictest attention, as he stepped towards it from his seat to unbolt it; and who could, therefore, have scarcely failed to perceive whether he raised his hand from the bolt, after unbolting it, to the latch several inches above it, and lifted it, or before he had time to do that, it was lifted from the outside by parties who could hear the unbolting of it, and who by this time were all impatience to rush in. And if such was the case, then it amounted to an actual breaking into the room and dwelling house by the prisoners, for such a lifting of the latch by any one of them with a felonious intent to open and enter the door; because any force, even an infinitesimal amount of force used for such a purpose, was sufficient to constitute an actual breaking in contemplation of law. But there is also such a thing as a constructive breaking into a dwelling house in the night time with the intent to commit a felony therein, and where no actual breaking whatever is necessary to complete and constitute the crime of burglary, as where by any trick, artifice or deception, and without the use of any force, an entrance is effected *in fraudem legis*, it will constitute a constructive breaking in law, the essence of the offense being the felonious intent with which the entrance is made at the time. 1 *Russ. on Crimes*, 793, 806, 812, 820. *Arch.* 275. 1 *Hawk. chaps.* 62, 63. *Lamott's Case*, *Kel.* 42. 2 *East's P. C.* 485. 1 *Brit. Crown Cases* 455. 2 *Arch.* 334, 338. If, therefore, the State had failed to prove to the satisfac-

tion of the jury that the door-latch was raised on the outside by one of the parties who violently pushed open the door and rushed into the room, as soon as it was raised, the trick, deceit, fraud and deception practiced by them on Mr. Floyd, by means of which he was induced both to unbolt and unlatch the door, and they thereby effected or obtained an entrance into the room without a resort to any actual force for that purpose, it was sufficient to sustain the indictment, and the prisoners should be found guilty in manner and form as they stood indicted.

Higgins, (*O'Byrne* with him,) for the prisoners. The State must prove to the satisfaction of the jury that the dwelling house in question was burglariously entered, and it must be both a breaking and entering, and not an entering merely, although the breaking may be either actual or constructive, as it is termed in law. As the utmost limit, according to the cases decided, of an actual breaking, there must be as much as the lifting of a latch at least, and thereby entering the house. That is the least degree of force that has ever been ruled to be necessary to constitute an actual breaking on a trial for burglary. But where the offender, even without that amount of force, or without any actual force whatever, by fraudulent pretense or misrepresentation effects an entry into the house with the intent to commit a felony in it, it will constitute a constructive breaking in law, and be sufficient to establish the crime of burglary. Where, however, there has been no actual pretense or misrepresentation of a deceitful or fraudulent character made to effect an entrance for such a purpose, it never has been held to amount to a constructive breaking even; and, if no actual pretense is made of an innocent or lawful purpose to gain an entrance into the house, and even though a latch may have been raised by the accused in order to enter it, it will not constitute a constructive, much less an actual, breaking in such a case. 2 *Arch.* 277 *in note*. This it is manifest does not properly fall within the class of cases which exemplify

and illustrate what is meant and intended in the definition of a constructive breaking, in contradistinction to an actual breaking in committing the crime of burglary. The fact was that Mr. Floyd himself had already performed the principal act of opening the door, and that was the unbolting it, and without which no raising of the latch merely would have sufficed for the admission or entrance of the parties then outside into the room, and if he did not actually raise the latch also, he was intending and actually proceeding to do so when he was anticipated in his purpose and in the performance of that much less important part of opening the door, by one of the parties on the outside of it. He was therefore not only consenting to, but aiding and assisting in the most material way to their entrance into the house; and how then could it be held on the authority of any case yet decided, that it constituted even a constructive breaking into it? But is it certain upon all the evidence that there was even any light tapping by any one on the outside against the door? It was proved that they did not close sufficiently tight, even when bolted and latched, to prevent some slight rattling from the action and force of the wind alone at such a time. And might not Mr. Floyd, after all, have been correct in his belief that the sounds at the door proceeded solely from that cause, and not from any rapping at it by a person outside, when he rose from his seat and proceeded against the admonitory suggestion of his wife, to open it by unbolting, as well as unlatching it, as he most probably did, since according to his own testimony, his only object was to satisfy her and the other ladies at the table, that there was no one outside rapping at it at such a time in the evening on such a night? And if he was right in his opinion as to the true cause of the sounds, as he in all probability was, and that there was no tapping against it by any one on the outside, then there could be no ground for the assumption even, that any trick or artifice, or fraudulent pretense or deception had been resorted to by any person, or persons on the outside to induce him to

open the door. And if that was the case, then there could be no ground whatever for holding that there was even any constructive breaking in the case. 9 *Ire.* 277. 1 *Moody's Crown Cases* 178.

The counts in the indictment which laid the ownership of the dwelling house in Mr. Floyd, were wholly inconsistent with, and repugnant to, the counts which laid it in the National Bank of Delaware, and therefore no conviction could be had, or sustained upon those two counts; while the other two were still more defective and improper, because the National Bank of Delaware is a corporation aggregate, and an artificial being, and in the nature of things, could not inhabit or dwell in any house. *Rex. v. Margetts*, 2 *Leach* 930.

Lore, Attorney General. Where the dwelling house in question is in the joint occupation of the corporation and of an officer or agent of it, and is not in the exclusive occupation of the latter, the ownership of it may be laid, and the better rule is to lay it, in the corporation. 2 *Arch.* 298. *Russ. on Crimes* 792. *Ros. Cr. Ev.* 356. 2 *Whart. Sec.* 1584. In a case of constructive breaking, the entry must be made immediately after the removal of the fastening when it is procured by trick or artifice, fraud or deception, and the case cited on the other side from 9 *Ire.* 277, so rules.

The Court, Gilpin, C. J., charged the jury. Much had been said by the counsels on both sides in the case as to the relative weight and value of direct and circumstantial evidence in a Court of Justice. As a matter of course, and from necessity, all judicial evidence must be either direct or circumstantial. When we speak of a fact as established by direct or positive evidence, we mean that it has been testified to by witnesses as having come under the cognizance of their senses, and of the truth of which there seems to be no reasonable doubt or question; and when we speak of a fact as established by circumstantial

evidence, we mean that the existence of it is fairly and reasonably to be inferred from other facts proved in the case. And when the existence of the principal facts is deduced inferentially by a process of sound reasoning from facts or circumstances proved and established in the case, it is termed presumptive evidence. The inference of guilt may be drawn from one or more evident and established facts, provided they be of such significance and force as to warrant such an inference. And more especially, may the inference or conclusion of guilt be drawn from a combination of facts and circumstances constituting a chain of evidence clearly leading the mind and reason to such a conclusion, although each link in the chain considered alone and independent of the others, may be deemed inconclusive, or of no great importance in the enquiry. The force of the whole when combined depends, however, on their number, independence, significance, weight and consistency with each other. But we all know that neither species of evidence is absolutely infallible, nor perhaps, can the one be considered less so than the other, so far as the results of criminal trials have enlightened us on the subject.

But the rules of law regulating the admissibility of evidence, whether direct or circumstantial, are precisely the same in criminal and in civil proceedings, although the necessity of resorting to circumstantial or presumptive evidence in proof of crimes, is much more frequent than in the maintenance of civil rights. And this is so for the manifest reason that crimes of a flagrant character are usually committed in secret. Direct and positive proof is not to be expected as a usual thing in such cases, and is rarely or seldom to be had in the prosecution of them. There is no trick, artifice or device that criminals do not resort to in order to avoid detection and conviction, and if Courts and juries should fail to give due weight and consideration to circumstantial and presumptive evidence, the worst and most dangerous offenders would most frequently escape unpunished. And we therefore say to you

that a combination of independent facts or circumstances that tally with and confirm each other, and each leading to and tending to establish the same conclusion, and thus constituting a chain of circumstantial or presumptive evidence to that effect, may afford proof of as convincing and satisfactory a nature, as direct testimony.

There are certain general rules founded in reason and justice applicable in all cases of criminal prosecution on indictment, which it is proper we should here state to you. And the first is, that the *onus* or obligation of proving every material fact and allegation in the indictment necessary to establish the charge against the accused, lies on the prosecution, and this results from the maxim of law that every person thus arraigned before a Court and jury and who has pleaded not guilty to the indictment, must be presumed by them to be innocent of the charge until he is proved to be guilty of it. Secondly, there must be clear and unequivocal evidence of the *corpus delicti*, that is to say, of the breaking and entering in the night time of the dwelling-house alleged in the indictment with the intent to commit a felony. In the next place the evidence against the accused should be such as to exclude to a moral certainty every hypothesis but that of the prisoners' guilt of the offense charged against them; and fourthly, the hypothesis of their guilt should flow naturally from the facts proved, and be consistent with them all. And we would further remind you that they are to be tried only by the evidence which has been adduced at the bar of this Court, and you should therefore give no heed and no consideration to outside rumors or reports or newspaper statements concerning them. Though strangers to our people, and charged with the commission of a very startling and heinous offense, they are entitled to a fair trial by an impartial jury, and are to be presumed to be innocent until they are proved to be guilty by the evidence before you.

In respect to the rule which requires that there must be clear and unequivocal proof of the breaking and entering

of the dwelling-house alleged in the night-time with intent to commit a felony, it is our duty to say to you that in the crime of burglary the breaking may be either actual or constructive. An actual breaking may be by forcing open a door, picking or opening a lock, breaking a window, or taking out a pane of glass, taking out nails or other fastenings, the turning of a key where the door is locked, or the unloosing of any fastening, the raising of a window, and even by the drawing or lifting of a latch; for all these have been held sufficient to constitute an actual burglarious breaking in contemplation of law. But breaking by construction of law, or a constructive breaking as it is otherwise called, is where an entrance is obtained by threats, fraud or conspiracy, as by a threat to burn the house unless the door is opened, or where in consequence of violence commenced or threatened in order to obtain an entrance, the owner the more effectually to repel it opens the door and sallies out, and the felon enters, or when the entrance is obtained by procuring a servant or some inmate to remove the fastening, or when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, or where some trick or artifice is resorted to for the purpose of inducing the owner to unlock or remove the fastening and open the door, and the felon enters, as if one knock at the door on pretense of business, or counterfeit the voice of a friend, and the door being thereupon opened, the felon enters; all these and their like have been held to constitute cases of constructive breaking on the trial of indictments for the crime of burglary. For the law will not allow the crime thus to be perpetrated and its criminal justice defeated by such evasions, where trick, fraud, artifice or deceit instead of force or violence, is resorted to to obtain or effect an entrance. And the law in respect to constructive breaking in cases of burglary when such means have been used to obtain an entrance without actual force, has thus been settled for upwards of two centuries.

Now, I will take leave to say to you that if you believe from the evidence that there was a knocking at the door,

and that Mr. Floyd in consequence of it was induced to go to the door and draw the bolt, and that before he had time to raise the latch, any one or more of the prisoners raised it on the outside and pushed or forced it open and rushed into the house with the intent to commit a felony, then there was a breaking by actual force and violence, and that all who so effected their entrance into it with that intent were guilty of the crime of burglary. But, on the other hand, if Mr. Floyd was induced by any fraudulent trick, artifice or deceit, such for instance, as a knocking at the door on the outside, to unbolt it and to raise the latch, and thereupon the prisoners immediately pushed or forced it open and rushed in with the intent to commit a felony, then it constituted in contemplation of law a constructive breaking and entry, and consequently the crime of burglary. Because trick, fraud, artifice and deceit so used with that intent is equivalent to actual force in contemplation of law. It was contended in the argument of the counsel for the prisoners that neither an actual nor a constructive breaking had been proved in the case; and especially, that no constructive breaking had been proved in it, and that the pretense used in such cases to obtain an entrance without actual force, must be a pretense of business, and that a request to be permitted to enter for such a purpose must be expressed in words, and so proved on the trial, or it will not amount to a fraud so as to constitute an entrance with the consent, or by the permission of the owner, and to a constructive breaking in contemplation of law. But we find no sanction for such a doctrine in any of the decisions of the Courts of this country or of England on the subject. We therefore expressly charge you that an entrance into a dwelling house of another in the night time, procured or obtained by any fraudulent trick, artifice or deceit, no matter what, with the intent to commit a felony, amounts in law to the crime charged against the prisoners, the crime of burglary. And for this purpose it will be for the jury to consider what the knocking at that particular door at such an hour and

on such a night meant, and what was the design of it, as disclosed by the startling circumstances which so suddenly followed it. Was the design of the knocker peaceable and honest, or was it not both grossly fraudulent and outrageously criminal? You know the men who entered had no lawful business there, and had no right there for any purpose whatever. Consider whether the object of their knocking at the door was not by such means to procure the unfastening of it on the inside, so that they might stealthily and treacherously obtain an entrance, and whether their purpose and intent in case they got into the house, was not to commit a felony. Knocking at the door of a dwelling house to which there is no bell attached, is the usual indication of a friendly call either on business or pleasure, but a knocking on it to obtain an entrance with the intent to commit a felony, is a fraudulent pretense. Burglars do not usually or often obtain their entrance into a dwelling house with such intents in this way; and although Mr. Floyd was in doubt for a moment whether there was any one rapping at the door, yet if such was the case, as it soon proved to be, what was more natural than for him to suppose that it was by some one who had a just and lawful occasion to call on him or some member of his family at that time, and to go to the door and unfasten it for the admission thus solicited and requested. And such was doubtless just what was expected and designed by the prisoners when they commenced the rapping. Can there then be any impropriety in saying that it was by a fraudulent pretense, as well as by an artifice and deceit the prisoners obtained an entrance into the house. A man may speak by his acts as well as by his words in certain instances, and the knocking at the door not only signified that there was some one at it who desired an entrance for a peaceable and lawful purpose, but also a request to those within to come to the door and open it for his or her admission. To steal or rob is a felony, and if the prisoners so obtained or effected an entrance into the house with the intent to rob Mr. Samuel Floyd,

or the National Bank of Delaware, they were guilty of the crime of burglary charged against them in the indictment. If, therefore, you are satisfied from the evidence that the dwelling of Samuel Floyd, or the dwelling house of the National Bank of Delaware (for the crime is laid both ways in the indictment) was broke and entered in the night time by one or more persons as detailed to you by Mr. and Mrs. Floyd, Miss Kates and Miss Shardon, or by other evidence in the case with the intent charged, the *corpus delicti*, the body of the crime, the burglary alleged, has been proved.

Breaking and entering the dwelling-house alleged merely, however, was not sufficient, but you must be also satisfied from the facts and circumstances detailed in the evidence of the same and other witnesses, that the breaking and entry was made with the intent to commit a felony, and to rob the National Bank of Delaware, or Samuel Floyd, as it is formally laid and alleged both ways in the indictment. This intent as thus alleged is the assertion of a substantive and material fact, and must be proved to the satisfaction of the jury, as much so as the breaking and entering, or any other material fact alleged in the indictment, in order to constitute the offense the crime of burglary. From its very nature, however, it is very seldom, if ever, susceptible or capable of proof by direct evidence, for the perpetrators of such crimes rarely proclaim or communicate the intention with which they commit them to any other persons than their own confederates. The motive or the intent therefore with which the breaking and entering was made, are to be inferred and ascertained from the facts and circumstances attending the act, the means and instruments with which they have previously provided themselves for the execution of their intention after effecting their entrance into the house, the character and contents of the house and building thus entered, whether a bank, or a building without much money, or any other valuable property kept or deposited in it, and also from what was done by the prisoners immediately on

entering the room, and as long as they continued in it, as indicating their ultimate intention, although they failed in the execution of it; the masks and disguises which they all wore, their drawn pistols, prompt and stern command to all of the persons in the room to make no outcry or effort to escape from it on pain of instant death, their seizure and handcuffing of Mr. Floyd with his hands behind him with a pistol leveled meanwhile at his head, and the gags with which they came provided to prevent any outcry or alarm from being made that might defeat their intention; and in case you are so satisfied that their intention was theft or robbery, it will be for you to infer and determine from all these facts and circumstances, as well as all others proved in the case, whether their ultimate intention was to rob Mr. Floyd, or the National Bank of Delaware, the banking house of which constituted a part of the same building; for it will be sufficient so far as this matter is concerned, to sustain the indictment, if you are satisfied from this circumstantial evidence that their intention was to rob either Mr. Floyd or the Bank. They indicated an intention and preparation on their part to do more, had they not been unexpectedly arrested in the further prosecution of their purpose by the precipitate escape of one of the young ladies from the room and the building to the street, and giving the alarm that there were burglars in the Bank, and it is for you to infer and decide from the facts and circumstances proved and referred to, what that intention was, and whether or not it was of such a felonious character as is alleged in either of the counts in the indictment before you. The tools and implements with which they came provided have been proved to be such as are generally known and used as bank-burglars' implements.

You must also be satisfied from the evidence before you in the case of the identity of the prisoners in the dock with four of the men who thus broke and entered the dwelling-house in question on the night of the 7th of the present month of November, (one of the five who thus

broke and entered it together having escaped arrest,) in order to convict them of the crime for which they now stand indicted and are on trial before you or of the identity of any one or more of the prisoners with the like number of the men who thus broke and entered it on that occasion, in order to convict any one or more of them less than the whole number of them of the offense charged against them in the indictment. Did they, or either, or any of them, (and if so, who of them,) commit the alleged offense? This question like all others of a similar character arising either in a civil or criminal proceeding before a court and jury, may be affirmatively established by either direct and positive, or by competent circumstantial or presumptive evidence. All of the men who broke and entered the house being entirely unknown to Mr. Floyd and all of the members of his family then with him in the room, and also being masked and disguised, none of the prisoners in the dock have been identified with any one of them by them or either of them in their examination as witnesses in the case, although they were able to say that one of the men was a tall man, and to describe the style and color of the clothes and overalls in which most of them were dressed and disguised at that time, and the tall man had sandy colored hair which was not so well covered or disguised as to prevent them from perceiving that fact. But on this point I will call your attention to the facts proved in the evidence, of their abrupt and sudden retreat from the room and premises, leaving behind them in the room, part of a jimmy, other steel handcuffs than those on the wrist of Mr. Floyd, a pistol and a gag; to their line of flight or retreat therefrom through a portion of the city, and to the various articles thrown away and soon afterwards found along it, and their striking similarity to articles of the same kind found in the house at the corner of 9th and Kirkwood Streets where the prisoners were the next day found and arrested for this offense, and where it is also proved they had been staying for several days next preceding the perpetration of it.

And to the other parts or sections of the jimmy also found there, and which exactly fitted the portion left by them in the dwelling-house at the Bank, as well as to all the other evidence of the witnesses who testified touching the identity of the prisoners with the men who broke and entered the dwelling-house in question on that night, giving to it just such weight and effect as you may conscientiously consider it properly entitled to, and to draw from it just such inferences and such final conclusions as in your best judgment after deliberate and mature consideration, you may conscientiously believe the evidence in the case to warrant; at the same time bearing in mind that in order to convict, the jury should be satisfied from all the evidence before them of their guilt of the offense charged in the indictment beyond a reasonable doubt after carefully weighing and considering the whole of it, and that the accused are entitled to the benefit of any reasonable doubt which the jury may entertain in regard to their guilt of the offense here charged against them.

Verdict—"Guilty."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE V. JOSEPH HILL.

A passenger railroad ticket in a ticket office of the company, is not a subject of larceny at common law, or under the provisions of the statute.

Kent County, Court of General Sessions, &c., April Term, 1874. Joseph Hill was indicted and tried for stealing one local passenger ticket of the value of two dollars and seventy-five cents, of the goods and chattels of the Philadelphia, Wilmington and Baltimore Railroad Company. It had been stolen from the ticket office and from the custody of the ticket agent of the company at Harrington, and had not been stamped and dated by him, or used, or disposed of by the prisoner on the road or otherwise.

Day, for the prisoner, raised the objection that such an article was not a subject of larceny under our statute. *Rex. v. Walsh*, 1 *Russ. & Ryan*, 220.

Bates, Deputy Attorney General, read the general provision of the statute defining the crime of larceny, and

said the ticket stolen for the commercial use and purpose for which it was made and printed, was worth its equivalent to the amount of just two dollars and seventy-five cents. Had the theft been of a promissory note, bill of exchange, a check or bank note, or any other similar article of commercial use and value particularly mentioned and provided for in the statute, it would have been necessary to so state and describe it in the indictment; but this article is covered by and comes under the broader and more comprehensive class denominated generally as goods and chattels, and which require no other or more specific description than is set forth in it.

But the Court held otherwise, and Chief Justice Gilpin remarked that the rule at common law is that larceny can only be committed of personal property, or goods and chattels which have some intrinsic value, or a value in itself without reference to any other matter or thing. The intrinsic value of such a piece of printed pasteboard merely is not even appreciable in any coin we have, and as we have no statutory provision making such an article as this railroad ticket a subject of larceny, we do not think the indictment can be sustained, and we must therefore direct the jury to acquit the prisoner.

THE STATE v. JOSEPH HILL.

A general verdict returned upon an indictment for breaking and entering in the night time the warehouse of a railroad company with intent to steal certain goods therein, and for stealing the same therefrom with two counts in the indictment, the first alleging the property in the goods to be in the railroad company, and the second alleging the property in them to be in the general owner of them, the railroad company being at the time the bailee of them merely, will not be set aside on a motion in arrest of judgment.

Kent County, Court of General Sessions, &c., April Term, 1874. Jacob Hill was also indicted and tried at this term for breaking and entering in the night time the

warehouse of the said company at Harrington and stealing a box of tobacco containing forty pounds, of the value of sixteen dollars therefrom, of the goods and chattels of the said Philadelphia, Wilmington and Baltimore Railroad Company. To this there was a second count added in the indictment alleging the box of tobacco to be of the goods and chattels of one Ezekiel G. Fleming, and a verdict of guilty taken generally on the indictment, and a motion in arrest of judgment was made on that ground.

Day, for the prisoner. The two counts cannot be joined. The verdict must distinctly find to whom the stolen goods belonged. At common law there was no restitution of the goods, or of the value of them to the person from whom they were stolen on a conviction for the larceny of them. But our statute provides for restitution of the single value of the goods if restored to him, and of twice their value if not restored to him, which cannot be done in this case, because it is left uncertain by the verdict to which of the two parties the goods belong. 1 *Ch. Cr. Law* 259, 141.

The Court, without hearing the attorney general, overruled the motion in arrest of judgment. Gilpin, C. J., remarking that this is an indictment against the prisoner for breaking and entering in the night-time a warehouse of the railroad company with intent to steal certain goods the subject to larceny therein, and the jury by the necessary import of their general verdict that he broke and entered it in the night-time with such a felonious intent, the offense was complete, and was sufficient to sustain the verdict and the judgment of the Court thereon without any further proof, or any further finding on their part. But it is a well settled rule of criminal pleading and practice that where there are one or more defective counts in an indictment, and there is a sufficient count on which the Court can pronounce sentence, and the verdict is

returned generally on the several counts, it will sustain the verdict and pronounce the sentence on the sufficient count. In this case both the parties named had a property in the goods, the railroad company a special property as the bailee of the goods for the time being, and Fleming the general property in them as the general owner of them, and their respective rights of property in them were entirely consistent with each other.

COURT OF OYER AND TERMINER.

THE STATE V. THOMAS VINES.

If the facts attending the affray between the deceased and the prisoner were not such as to convince the jury that the prisoner had reasonable grounds to believe that he was in immediate danger of being killed by the deceased, or of suffering great bodily harm at his hands, and had no way of escape from him but by killing the deceased, it could not be excusable in self-defense, but it would amount to the crime of manslaughter, at least.

Sussex County, October Term, 1874. At a Court of Oyer and Terminer, held at this term, Thomas Vines was indicted and tried for the murder of Abraham M. Deputy in the first degree, in South Milford, on the 9th day of the present month. The prisoner was going home about 6 o'clock in the afternoon of that day, in a south direction on the east side of Walnut street, and had crossed Front street in South Milford, when the deceased, who was just then coming down Front street towards the crossing and when not more than twenty-five or thirty feet behind him was heard to call to him and say, "stop you d—d lying, thieving son-of-a-bitch! and let us have it out right here," but the prisoner continued on his course, the deceased still following him with accelerated steps, and paid no

attention to him, until he soon called to him a second time and repeated the insulting epithets, when he stopped and turned around and faced him, but without advancing at first to meet him, and asked him who he was calling "a d—d lying, thieving son-of-a-bitch?" The prisoner then advanced some steps to meet him, and as soon as they met face to face the deceased struck two blows at him, first with his right and then with his left fist, and then seized hold of him bodily, but though witnessed by four or five persons at different points on the street at some distance from them, no one saw the prisoner strike him a blow, except that one of them who was sitting at a front window of a house fifty feet from them, saw the prisoner draw back his right hand and strike the deceased in his left side. They then separated and the prisoner went on up the street towards his home. The witness then put on his hat and went out on the street, and found that the deceased had been stabbed and was bleeding. The first physician called to see him stated that he found him not long afterwards lying on the ground at the corner of Walnut and Front streets in South Milford, wounded in his left side, and the second who had arrived after he had been removed to his house, and who afterwards conducted the *post mortem* examination of his body before the coroner's inquest, testified that there were two stabs made, he judged, with a sharp-pointed knife in his left side, one a little lower than the other, and that the upper one had penetrated the heart about an inch in length and about three-fourths in depth, and was necessarily mortal, although the other, which he also described, he thought would have been fatal without it. The voluntary statements made by the prisoner to the constable and to the Justice of the Peace by whom he was committed were put in evidence by the State, the substance of which was that after they had come together on the occasion, Deputy struck him twice with his fists and then collared him to choke him, and that he had once choked him before and he was afraid he would kill him; and when he collared

him and tried to choke him he had his knife in his hand, and he supposed he then struck him with it, but whether one or twice he could not say, as he did not remember. And when asked by the constable at the time of his arrest if he had any knife, he took from his pocket a common sized Barlow knife and delivered it to him, and which he then produced and identified. The deceased was a stout and athletic man, the prisoner a small and feeble one; and he was represented by a number of very respectable citizens of the place who were called to testify on the subject, to be a man of a peaceable, quiet and orderly character.

The Court, Wales, J., charged the jury. Homicide is justifiable, excusable or felonious. The taking of human life is said to be justifiable when done in the execution of public justice, as in the case of a person who has forfeited his life by the laws of his country and the verdict of a jury; or, in the advancement of public justice, where an officer kills a person charged with felony, when the latter assaults and resists him; or, for the prevention of any violent and atrocious crime, as where a person who is killed had attempted a robbery, or to murder another, or to break into a house in the night-time.

Excusable homicide is the accidental killing of another, that is, by misadventure, unaccompanied by any criminally careless and reckless conduct; or, where the killing is in self-defense, upon a sudden affray or desperate attack. This self-defense is the right of natural defense and self-protection, and does not imply the right of attacking. To make good this excuse for the killing of another it must be shown that the accused had no other possible or probable means of escaping from his assailant, and that he must have been in imminent and manifest danger of either losing his own life, or of suffering great bodily harm. And it must farther appear that the accused was closely pressed by the deceased, and that he retreated as far as he safely could, in good faith and with an honest intent to avoid the violence of the assault.

Felonious homicide is subdivided, under the statutory laws of Delaware, into murder of the first degree, murder of the second degree and manslaughter. Murder of the first degree is defined by the statute in these words: "Sec. 1. Every person who shall commit the crime of murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree and of felony. Sec. 2. Every person who shall commit the crime of murder otherwise than is set forth in the preceding section shall be deemed guilty of murder of the second degree and of felony." The general definition of murder is where a person of sound memory and discretion kills any reasonable creature in being, under the peace of the State, with malice aforethought, either express or implied. Express malice is proved by evidence of a deliberately formed design to kill another, and such design may be shown from circumstances, such as the selection of a deadly weapon, privily lying in wait, a previous quarrel, former threats, the preparation of poison, or the like. Implied or constructive malice is an inference or conclusion of law, as where the accused may not have intended to take life, but may have been engaged in some other unlawful or felonious act, from which the law raises the presumption of malice. The law presumes malice from every act of killing, unless the circumstances proved exclude or rebut such presumption; and, in general, the act of killing being proved, it is incumbent on the accused to show that his deed was not the result of malice, either express or implied. And he may do this by showing that he had no intent to kill, that the act of killing was either accidental, or was done in self-defense, and therefore excusable; or that the deed was committed upon a sudden, adequate and sufficient provocation, "in the heat of passion and with no intent to take life, being entirely without premeditation and without time for reflection. And this brings us to the definition of manslaughter which is the unlawful killing of another without

malice, either express or implied, and on a sudden and sufficient provocation, and differs from excusable homicide in this, that in self-defense there is an apparent necessity for self-preservation to kill the aggressor, but in manslaughter there is no necessity at all, being only a sudden act of anger or of revenge.

Having now briefly passed in review the different kinds of homicide, as defined by the common and the statutory law, we will proceed to consider the modifications made in the crime of murder by the statute. Malice is the essential element of murder at common law, and is also necessary to constitute murder of either degree under the statute, but with this difference, that the act of killing must be committed with express malice aforethought, or in the perpetration, or the attempt to perpetrate, a crime punishable with death, to make it murder of the first degree, and that where the act is done without express malice, and is accompanied only with implied or constructive malice, it is then murder of the second degree. The broad distinction between murder of the first degree and murder of the second degree is the distinction between express malice aforethought and implied or constructive malice; either degree of murder under the statute is the same as at common law, but under the statute different penalties are prescribed for the different degrees. The premeditated design to take life is evidence of express malice, and may be shown by secretly lying in wait, the use of a weapon almost certain to cause death, the previous utterance of threats, former grudges, and the like; and when this design has been fully completed and carried out, the act becomes murder of the first degree. Murder of the second degree is where the intent to kill is not clearly proved, but the act of killing is done suddenly, in the heat of passion, and without sufficient or adequate provocation, so as to reduce it to manslaughter, or while in the commission of an unlawful act not punishable with death. The law, indeed, presumes malice, but it is implied or constructive malice, and

not express malice aforethought. In determining the intent, or motive with which an act is done, in the absence of express words, we can only judge from the circumstances of the particular case which may be at the time under consideration. As a general rule, every one is presumed to intend the natural consequences of his own act. Thus a bullet shot into the brain of a man, or a knife thrust into his heart, is known to be fatal to life, and the person who shoots the ball, or uses the knife, is presumed to intend the natural consequence in either case.

Manslaughter, the lowest degree of felonious homicide, as we have already informed you, is the killing of another without malice, either express or implied, but the act is committed in the heat of blood and upon great, sufficient or adequate provocation. And it is important that you should bear in mind that to reduce the offense from murder of either degree to manslaughter, there must be an absence of malice and the proof of provocation; that is, there must have been no premeditated design to kill, and the accused must have acted suddenly, in a transport of rage, excited by an actual assault, by a physical contest with the deceased, and such assault or contest must have been first made or begun by the deceased. And it is equally important to remember that the act of force, or chastisement, intended on the part of the accused, bore some reasonable proportion to the provocation received, and did not proceed from brutal rage or reckless malignity. In other words, a feeble assault, or a slight blow, should not be allowed to establish this defense, nor should the accused be permitted to palliate the crime when he has invited or defied the attack, so as to make it a pretext for striking down a weaker or unarmed adversary.

Another principle or rule of law on this subject, and one which you must carry with you in your deliberations, is that no taunting, irritating, or threatening words or expressions, or any insulting or defiant gestures on the part of the deceased, unaccompanied by an actual assault, or

blows, will constitute a sufficient provocation to reduce the grade of the offense below murder.

Now, gentlemen, you are to apply these principles and provisions of law to the case of Thomas Vines, the prisoner at the bar. To do this with a view to arrive at a true and just verdict, you must recall the facts proved by the witnesses in your hearing. There are some facts directly proved and ascertained. It is known that Abraham M. Deputy met his death at the hands of the prisoner; that the two men encountered each other on Friday evening last, between six and seven o'clock, at Cedar Creek Hundred, in Sussex county; and that then and there the prisoner, with a common barlow knife, inflicted upon the body of Deputy two wounds which caused his death on the following Sunday morning. It is also in proof and uncontradicted, that immediately before the encounter, Thomas Vines was walking along Walnut street, in South Milford, going towards his house, and had passed beyond the lower side of Front street, and that at the same time Deputy was following a short distance behind, calling to Vines to stop making use of obscene language and opprobrious and threatening words and epithets. At this point you must picture to your minds their positions, movements, and acts as narrated by the witnesses. Vine was still proceeding in the direction of his house, until Deputy had also crossed to the lower side of Front street, when, suddenly, Vines halted, turned round and, inquiring who are you calling a ——— — retraced his steps, going back to meet Deputy, taking his hand from his pocket, and using the motions described by the witnesses. Deputy still continuing his progress, the men came into collision. Here, at this precise moment, you must apply the legal definition of self-defense to the actual facts of this case, for it is on this ground that the prisoner claims he acted and therefore asks to be acquitted. You must inquire whether it was necessary for Vines to stop, turn back and go to meet Deputy? Was his life in peril or was he in imminent danger of suffering great and enormous

bodily harm or injury, if he had not turned and faced his pursuer? Was he pressed to the wall, in the language of the books, and had no other possible or probable means of escape from Deputy. These questions must be answered in the affirmative to establish the plea of self-defense. You must take into consideration the time, place and surrounding circumstances. The time was early in the evening, the place within hailing distance of help, and it does not appear that Deputy was armed, or that Vine was too weak or feeble to make good his escape, or to get rid of his pursuer if he had chosen to do so. Were the facts attending this affray such as to force the belief on your minds that Vines thought, and had reasonable grounds to think, that his life or personal safety was in such immediate and instant danger that there was no chance or probability of escape from death, or great bodily harm, except by killing Deputy? Had he no other way out of the difficulty except by turning back meeting Deputy and striking him down? It is our duty to say to you that unless you thus believe you cannot acquit the prisoner on the plea of self-defense. In making up your judgment on this theory of the defense, you must carefully consider the danger of giving too wide a latitude, or a too liberal and easy reception to this excuse. The danger is that if indulgence is shown and the rule of law is thereby relaxed, inducement and temptation may be held out to the evil disposed, and to such as are inclined to deeds of violence and crime, to take the law into their own hands and to constitute themselves the judges of the facts necessary to support this plea.

If you should not be satisfied that the prisoner acted fairly and honestly in self-defense, and of this you are the sole judges, you are then brought to the consideration of the question: is the prisoner guilty of murder of either degree, or of manslaughter?

If there is no evidence of express malice aforethought on the part of Vines when he struck the fatal blows, that is of a premeditated design or formed intent to kill, which

can be proved only in the manner already stated to you, by the words of the prisoner or his conduct, or his previous relations to the deceased, then he cannot be guilty of murder of the first degree. To convict of this offense you must satisfy your minds from the evidence in the case, that the prisoner acted with express malice. As to the second degree, if there was no clear and well-defined intent to kill, we mean no evidence of such intent, and it appears that it was the purpose of the prisoner to inflict punishment, or injury, only upon the deceased, and that he acted in a sudden heat of passion, without premeditation, and also without sufficient provocation, then the law presumes malice, and the act was done with implied or constructive malice, and is murder of the second degree. And, lastly, if you should be of the opinion that the evidence warrants the conclusion that he is not guilty of either degree of murder, but that being assaulted or violently attacked with blows, by the deceased, and that such assault or attack was a sufficient and adequate cause of provocation, by which the prisoner was suddenly excited to a transport of rage or heat of passion, and for the instant losing control of his faculties and the exercise of his judgment, struck the deceased with his knife, then he acted without malice, either express or implied, and is guilty of manslaughter only.

Proof of good character is available only in doubtful cases, for the purpose of showing that the accused had not a wicked or evil intent at the time the act complained of was committed, and to establish the inference that a person who had always lived a peaceable and orderly life, unstained by acts of violence, and whose general reputation as a law-abiding and well-disposed citizen had hitherto been unquestioned, would not suddenly act in manner contrary to his previous conduct and habits. But the reputation for good character, however excellent and irreproachable, should not be allowed to weigh against positive, direct and uncontradicted evidence.

Finally, we repeat that you are the judges of the facts which have been testified to, that is, you are to judge what facts have been proved, and it is for you to declare whether the evidence has convinced you, beyond a reasonable doubt, that the prisoner is guilty of either degree of murder, or of any offense whatever. You are not to be governed by probabilities, but by the consideration whether the prisoner's innocence is reasonably inconsistent with the evidence; for the rule of law in this subject is, that every person is presumed to be innocent until he is proved guilty, and that his guilt must be proved beyond a reasonable doubt. This doubt must be an intelligent and reasonable one, naturally arising from deficient, conflicting or uncertain evidence, and not a possible, imaginary or vague doubt. It must be a doubt honestly entertained, and such as prevent the forming of a satisfactory opinion.

It is your duty carefully and seriously to investigate and weigh the evidence, with a correct and conscientious desire to arrive at the truth and to render a verdict accordingly.

Hodgson, Deputy Attorney General, and

Pennington, Attorney General, for the State.

Cullen, for the prisoner.

Verdict—"Not Guilty."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE V. WESLEY CROCKER.

In a case of misdemeanor merely a peace-officer has no authority to arrest the offender without a warrant, unless it is committed in his view. This is a well-settled principle of the common law, and the town law of Dover conferring powers on its constables constitutes no exception to it in such a case.

Kent County, Court of General Sessions, &c., October Term, 1874. Wesley Crocker was indicted and tried for an assault and battery committed on Thomas Cashell, the town constable of Dover, and for resisting an arrest by him. The defendant had committed a breach of the peace in a store adjoining the residence of Cashell, the constable, who was at the time in his yard adjoining the rear of the store, and the wife of the merchant having hastily stepped back and notified him that there was a fight in the store without mentioning any names, and without his having seen, or heard anything more of it than she stated, he hastened round to the front street and just then seeing the defendant running out of the front door of the store, he pursued and caught him when the

defendant with great force and violence resisted the arrest and committed the assault and battery in question on him.

Watson, (Massey with him,) contended that under the official powers conferred upon him as a town constable, he had no authority under the facts proved to arrest the defendant, and became a trespasser the moment he attempted to make it. Cashell was neither present, nor saw, nor heard any of the disturbance in the store, except what was said to him by Mrs. Hartnett in the back yard, that there was a fight in the store, and he did not even know when he started in pursuit of the defendant, nor until after he had succeeded by brute force in overpowering and arresting him, that he had been in any way involved in the disturbance. The defendant was therefore justified in resisting the arrest as far as he was able, and certainly to the extent proved in the case, and should be acquitted.

Hodgson, Deputy Attorney General. It took the constable but three-quarters of a minute to run from the back yard round to the front door of the store where he saw the defendant running out of it, and a bloody man in it, and it took him less time to catch the defendant, when this assault and battery was at once commenced on him by the defendant. It was all one continued transaction and disturbing of the public peace, and he was so near at hand at the beginning of it, that it might be held to have been in his constructive, if not his actual presence from the start.

The Court, Gilpin, C. J., charged the jury, that in a case of criminal misdemeanor merely, a peace-officer has no authority to arrest the offender without a warrant, unless it is committed in his view. Such is the general and well-settled principle of the common law, and the town law of Dover referred to constituted no exception to it in a case like this.

The defendant was acquitted.

COURT OF OYER AND TERMINER.

THE STATE *v.* JOSEPH H. TAYLOR.

Murder with express malice and of the first degree, and with implied malice and of the second degree under the statute, and manslaughter defined and distinguished.

The mode and manner of the killing must be proved to the satisfaction of the jury substantially as alleged in the indictment; and when it is alleged in the indictment that the accused with malice aforethought threw the deceased into a creek by means whereof he was then and there drowned, these allegations must be proved and established to the satisfaction of the jury beyond a reasonable doubt, to warrant a conviction of the accused; but this may be done by either direct or circumstantial evidence, when the evidence, however, is wholly circumstantial, it must be of such a character as to exclude every other reasonable hypothesis than that of the guilt of the accused.

The *onus* of proof is on the State to establish the *corpus delicti*, or the killing by the means substantially as alleged in the indictment, and that the deceased came to his death by drowning, and by being thrown into the creek alleged with malice aforethought by the accused.

New Castle County, November Term, 1874. At a Court of Oyer and Terminer held at this term, Joseph H. Taylor was indicted and tried before Wooten, Houston and Wales, Judges, for the murder of Robert A. Mackey in the first degree, in St. Georges' hundred on the 28th day of July preceding. The evidence on which the prosecution relied for a conviction was wholly circumstantial, and consisted of the following testimony in substance: John E. Lewis, keeper of the Deer Park hotel at Newark, testified that he was but slightly acquainted

with Robert H. Mackey, the deceased, but he was a guest at his home and took his breakfast there the morning of that day about 7 o'clock and settled his bill for himself, and horse, and left a little after 9 o'clock. Joseph H. Taylor, the prisoner, was then there, and took him out one side and told him he was in the lightning-rod business. While Mackey had his horse and carriage standing before the door of his hotel the first he saw of Taylor that morning, he and Mackey were coming round the corner of the hotel, and there met, and spoke to each as acquaintances, and walked into the bar-room and took a drink together. Soon afterwards he saw them standing before the door by the side of the horse and carriage talking together, and heard Taylor tell him that he was going down to Mrs. Sears' to see about putting up a lightning rod, but before that he had told him that he was going home. Mackey drove a brown mare to a falling top wagon for two persons.

Samuel L. Garrett testified that he lived in Newark at that time and was acquainted with both the prisoner and the deceased, and that the weight of the latter he should suppose was a hundred and thirty or a hundred and forty pounds, and that he was lame in his right leg, and that he saw them there that morning at the Deer Park hotel between 8 and 9 o'clock, and saw them afterwards at the Washington House, about three hundred yards from it. Mackey was sitting on the porch with his horse and buggy standing in front of it on the street, and in passing he stopped to speak with him, and he invited him into the bar for the purpose, and they stepped in and took a drink together; just as they had finished Taylor was seen to be in the room, and Mackey invited him to take a drink also, which he did, and Mackey paid seven cents for it which seemed to be all the change he had. And Mackey and Taylor afterwards came out of the bar-room and got into the buggy and drove off together down the main street of the town in an eastern direction

towards Ogletown and Christeen. After they had all three taken a drink as before stated, he and Mackey went out on the porch and took seats, and after awhile Mackey and Taylor went into the bar-room again and staid about five minutes before they came out again and got in the buggy and drove off, as he had already stated.

John Strickline, bar-keeper at the Washington House, confirmed the statement of the preceding witness as to the three drinks taken by him and Mackey and Taylor at the bar there that morning, and further testified that when the latter were about to drive off together they came into the bar-room again together and Taylor enquired of him what time dinner would be ready at the hotel, and when he told him at half-past 12 o'clock, said to him they would be back in time for it, and told him to take care of his valise, which he did, but he never came back for it afterwards. Taylor was dressed in light and Mackey in dark colored clothes, and Taylor was a taller and larger man than Mackey. He has been acquainted with both of them for several years, but had never seen them together before that time he believed; they had been acquainted with each other however, prior to that time. Taylor and Mackey took another drink together at the bar just before they left, and Taylor told him that he would pay for it when he came back for his valise.

Georgianna Bullin, keeper of a public house in Christeen, testified that Taylor and Mackey drove up to her house there about 11 o'clock that morning. Taylor was driving and got out of the carriage first, and Mackey afterwards. Taylor told her he was going to St. George's. She thought Taylor was sober, but Mackey was under the influence of liquor. Taylor told her if Mackey asked for beer not to let him have any; for he had been drinking, and he did not want him to have any more. She told Taylor she did not keep or sell any liquor but beer. They

did not stop long at her house, and Taylor was driving when they started off.

Abel Riggs testified that he kept bar at that time for Ivan D. Wallace at St. George's, and that Mackey and Taylor came there that day between two and three o'clock in the afternoon in a yolk wagon drawn by a dark bay horse, with the top down, and remained there about an hour. They took a drink together at the bar soon after they came in, and Mackey then took a seat in the bar-room and soon fell asleep in it. Their horse was turned out and fed. Taylor spoke about his being in the lightning rod business, and engaged board there for three men and three horses. Taylor and Mr. Wallace went out of the hotel together, and when they came back again into the bar room Taylor wanted to sell the horse they had driven there to Mr. Wallace; and when they left there in the carriage between four and five o'clock in the afternoon Taylor was on the right side of it and Mackey on the left, and Taylor was driving. Mackey was dressed in dark and Taylor in light colored clothes and they both had their coats on. The carriage top was down, and it was a clear day and a little warm. They drove from the hotel down towards the canal bridge and Odessa. Mackey took but one drink there, but Taylor took more, and bought a pint of whiskey of him which he took away in a bottle with him, and which he promised to pay for the next Friday, but neither that or the feed of the horse had been paid for yet. Taylor directed both to be charged to him. Odessa is seven miles from St. Georges's. He had seen Mackey once, but Taylor never before that day, and he first heard of the death of Mackey in the evening of the next Friday.

Philip Reading, negro, the hostler at the same hotel, testified that Mr. Mackey and another man he then did not know, but learnt while he was there that his name was Taylor, and who was the same person as the prisoner

then in the box, came there that day to Mr. Wallace's hotel in a York wagon, with a dark bay mare from the direction of Delaware City, and he heard the man named Taylor while there bragging on her great speed as a trotter. When they were about to start away Taylor picked Mackey up and put him in the carriage which made him so angry that he got out of it, and said to him that he would let him know that that horse and carriage belonged to him. But Taylor after a while succeeded in coaxing him to get in it again, which he helped him to do, and then got in himself on the right side and took the reins, and drew the mare whose head was towards Kirkwood, short around towards Odessa in the opposite direction, and drove off. It was then about 4 o'clock in the afternoon, and they had been there about an hour. The carriage top was half down when they came and when they left. The mare was very much jaded, and did not mind the whip when he cut her hard with it at starting from there. He afterwards recognized her when she was brought back to Mr. Wallace's hotel there, and then found that she had a good many severe marks of the whip on her right side. They both had their coats on when they left there.

William Fleming testified that he lived on the 28th day of July last near McDonough between St. George's and Delaware City, and was driving a team on the road pretty late in the afternoon of that day when he met a horse and wagon coming pretty fast, with what he supposed at first, while it was yet some distance from him, but one man in it, but as it came nearer to him he saw there was one sitting up on the right side of it driving, and another man on the left side of the seat of it, but lying sideways with his head across the lap of the other, who had his left arm and hand around and over his head and face and holding the reins in that hand, while with the whip in his right hand he was whipping the horse at almost every step, and in that way they met and passed him. It was a dark bay animal which he noticed more than he did

either of the men in the carriage, as it was moving quite fast. He remembered that the man sitting up and driving on the right side of the carriage was dressed in light colored clothes, but he could not say how the one lying with his head and face across his lap was dressed. His face was so much hid by the left arm and hand of the other and the way the reins were held over it, that he could see but little of them, as they approached or passed him. He had never seen either of the men before to the best of his knowledge, but he recognized the animal as soon as he saw her in a short time afterwards.

Rebecca Farrell, negro, testified that she then lived at Drawyer's Bridge, and about 5 o'clock in the afternoon of the 28th day of July last she was in her garden between her house and the bridge, and heard a carriage coming before she saw it, and looked up and saw a horse and carriage coming on the road towards Odessa. In it were two men, one of them was driving and the other was lying down across his lap. The one that was driving was sitting on the right side of the carriage. He had on a dark coat, and the one that was lying down was in his shirt sleeves, and seemed to be a shorter man than the other. The one that was driving seemed to be a nice looking gentleman. The horse was in a slow walk when they passed by where she was, and after it had passed he looked back towards her until the carriage was twenty or twenty-five yards down the road from her. The horse was what she would call a bay horse. The top of the carriage was up, but both the back and the side curtains were off or were rolled up.

Nathan Farrell, negro, the husband of the preceding witness, testified that he lived at the same place, and the same afternoon while he was hoeing corn in his lot he saw a horse and buggy pass on the road and drive up to and on the bridge, and saw them stop and a tall man in light colored clothes get out of the carriage and walk round

the horse on the bridge, and soon heard a splash, and looked again and saw a tall gentleman-looking man dressed in light clothes standing on the wing wall of the bridge looking down in the water; the horse and carriage were then standing on the bridge close up to the east side of it. He had a full view of the man standing on the stone wall and wing of it, but not so good a view of the horse and carriage. He kept on at his work, and soon afterwards when he looked up again the man and the horse and carriage were gone. It was then about 5 o'clock in the afternoon. It had rained the night before and softened the ground, and when he walked down to the bridge about sun-down that afternoon, he noticed the track of a carriage that had been driven up on the bridge nearer the east side of it than he had ever seen before. It was as close to the wall of the bridge as the carriage could get. The top of the carriage was up.

Joseph Roberts, a surveyor, testified that at the instance of the Attorney General he had made the necessary survey and measurement and prepared a plot of Drawyer's Bridge over Drawyer's Creek in St. Georges' hundred, and the road and locality referred to by the two preceding witnesses, and marked the measurement upon the plot or diagram produced and submitted to the Court and jury by the Attorney General. He then proceeded and stated that as appeared by it, the bridge was twenty-four feet long, and fourteen feet two inches wide, the wing walls at each end of it nineteen feet long, the railing on the side of it was three feet five inches high, the mean rise and fall of the tide in the creek there was three feet, the floor of the bridge was four feet two inches above the water when he measured it, and the channel of the creek beneath the middle of the bridge was ten feet six inches deep, and at the southern end of the bridge the creek was eight feet four inches deep; and that end of it is ninety-four yards from the house of Nathan Farrell, the witness who had just testified in the case, and is one

hundred and forty-four yards from the place where he was at work in his lot at the time he has spoken of, and eighty-six yards from the place in their garden where his wife, Rebecca Farrell, was at the time she has spoken of, and it was fifty feet from that point to the horse and carriage when she first saw it on the road. The average height of the wing walls at the southern end of the bridge is eighteen inches, and of those at the northern end thirty-two inches. When he made these measurements the stage of the tide at the bridge was eighteen inches below full flood tide or high water.

Asbury Pennington testified that he saw Taylor, the prisoner, at the Head of Sassafras between half-past 5 and half-past 6 o'clock in the afternoon of the 28th of July last, with a bay mare and a York wagon which he said he wanted to sell, and that she could carry two men in a carriage a mile in three minutes and twenty seconds. He said he was going to Massey's Cross Roads. He was then dressed in a dark blue coat and light colored pantaloons.

Joseph L. Parsons testified that he saw the prisoner at his hotel in Middletown on Tuesday evening the 28th of July last, with a buggy and a dark bay or brown mare, and that he wanted a drink, but he told him he thought he had had enough, and did not let him have it. He had on a dark blue coat and light colored pants and he also had another coat of light colored check with him. He came back early the next morning and stayed at Middletown till near night, and he first traded the bay mare off that day with Mr. Stomboy for a mouse-colored horse and twenty-five dollars to boot, and also the wagon the same day with Mr. John D. Roberts for a buggy without a top and twenty dollars. He then traded the horse he got from Mr. Stomboy for another with another person, and got fifteen dollars to boot in that trade. He took a good many drinks of whiskey that day. He took the light colored coat away with him.

James E. Townsend testified that the prisoner came to his hotel at Townsend the 29th of July last, with a Jagger wagon and an old brown horse and left the next morning with them going in a northward direction towards Odessa or Smyrna. He would have taken him to be a sober man when he came, but after he had taken several drinks he seemed to become nervous and uneasy. About 11 o'clock he told him it was bed time, but he did not seem inclined to go, and he then wanted him to buy his horse and wagon. He had seen him very early that morning at Middletown, before he came from there to Townsend, and at Middletown he called himself "Tom Collins."

James L. Currey testified that he saw the prisoner at the hotel in Odessa on the 30th day of July last; he had a horse and buggy, and as soon as he came in he wanted to know if any body there had a horse and buggy he wanted to trade. He had on a dark blue coat and had another with him of a light plaid color like the one he had on in the prisoner's dock; and he took several drinks while he was there. And George Gilch testified that he saw the prisoner in Odessa on the 30th of July last, and traded horses with him and got a black horse from him for a bay one, and paid him five dollars to boot about 2 o'clock in the afternoon of that day.

Caleb Miller testified that the prisoner left a horse and carriage and harness at the White Horse Hotel in the City of Wilmington kept by him, towards the close of the day on the 30th of July last, and had disappeared from there without ever having called for them.

On the 31st day of July last the body of an unknown dead man was found on the surface of Drawyer's Creek above and near the bridge before described dressed in dark pantaloons and vest, but without any coat on, which was afterwards fully and satisfactorily identified by a brother and a brother-in-law of the deceased and by Doct. Peter V.

Stroud, all from Parkesburgh, Chester County, Pennsylvania, where both the prisoner and the deceased had also resided up to the time of his death, as the body of Robert A. Mackey, and by whom it was proved that he had left that place on the 27th day of July last and driven to Newark alone in the horse and wagon which he had there, and which he had borrowed for the occasion of his brother-in-law, and where he met on the following day with the prisoner at the bar, whom he had previously long known in Chester County in that State. There had been two inquests held on the body by the coroner of New Castle County, the first on the day of the discovery of it, and the second a week later, it having in the mean time been interred and then disinterred at the instance of the friends before referred to, for that purpose and for their identification, who had not been apprised of the finding of it, until after the first inquest. The physician present at both inquests and who examined the body on both occasions testified that he found no wounds whatever upon it, but he did not examine the lungs or the stomach, although at the second inquest he removed the scalp. One of his wrists had been somewhat injured and he found that one of his knee joints was stiff.

Soon after the prisoner returned to Chester County, Pennsylvania, and before these proceedings had been concluded, he had gone to the State of Ohio, and the friends of the deceased in the former State learning that he was at the town of Bucyrus, in Crawford County, in the latter State, addressed a letter to Henry I. Row, the sheriff of that county, who was present as a witness in Court and testified that upon the receipt of the letter he arrested the prisoner on the 17th day of August last in the town of Bucyrus, the county seat of Crawford County in the State of Ohio, and took him to jail there, on the charge of having just murdered a man who lived in Chester County, Pennsylvania. He had on at the time light colored pants and a dark blue coat of a somewhat peculiar color, described in the letter, and which also contained a

small fragment of the material of which it was made, in consequence of which he at once took the coat from him, and had it then here with him ready to be produced in Court. Robert A. Mackey was the name of the man stated to have been murdered by him. He informed him of the charge when he arrested him, and he took no exception to his authority to do it, but went with him without any difficulty to prison. Two days afterwards in a conversation with him in the jail, he told him that he and Mackey had been riding together and on a big drunk, and that coming to a bridge across a creek, Mackey driving and licking the horse, he ran the wagon against one side of the bridge which frightened the horse and made it run, and when it got off the bridge, and he, the prisoner, had got it stopped, he jumped out and seized it by the head, and told Mackey to get out and turn the carriage-body so as to unlock the wheels which had occurred in taking up the horse, and that soon after Mackey got out and went round behind the carriage he heard a splash in the water, and went back there himself as soon as he could get the horse out of the fix, and looked about for him but could not find him, and had not seen him since, and he then got in the carriage and drove off.

A requisition was afterward issued by the Governor of this State to the Sheriff of this county on the Governor of Ohio for the surrender of the prisoner, and upon which he was duly surrendered and brought back here for indictment and trial. In the execution of this mission the Sheriff was accompanied and assisted by James Hanmell, of Chester County, Pennsylvania, who was well acquainted with both the prisoner and the deceased, and who was also present and examined as a witness in the case, and who stated that while he was in Bucyrus he talked with the prisoner in the jail there about the death of Robert J. Mackey and he asked him where he and Mackey at that time had been, and he said he got in with him at Newark and they drove down to Christeen and St. Georges' and until they got to the place where he lost him. He

then asked him how he came to lose him, and he said that in coming to a bridge over a creek, they ran the carriage against a tree which threw them out of it, that he went around behind the carriage to lift it around, after which he led the horse and carriage across the bridge to the other side of the creek, took a drink out of his bottle and then went back to look for Mackey, but could not see him anywhere, and he thought he must have fallen in the creek and sank out of sight before he got back, and he then drove from there to the Head of Sassafra.

The coat which the prisoner had on when he was arrested in Bucyrus was then produced and exhibited in evidence, and was proved and identified as the coat of the deceased by several witnesses, and among them, by the tailor who had made it for him about the middle of July the year before.

T. F. Bayard, for the prisoner, in opening the defense in the case to the Court and jury, called the attention of the Court particularly to the fact that the indictment charged that the prisoner pushed, threw and cast Mackey into the water of the creek mentioned, and that he was thereby then and there suffocated and drowned, or in other words, that the prisoner then and there drowned him, and so killed and murdered him, but that no proof whatever had been produced, with all the testimony elicited on the part of the State, that his death, which they did not deny, was caused by drowning. For *non constat* that he was not dead when he was thrown into the water, although, even that is neither proved nor admitted in the case. And even if he was killed by the prisoner, but was killed in any other way, and was dead when thrown or cast into the creek, he could not be convicted on the indictment.

The counsel for the prisoner then proceeded and proved by Amos G. Cooper who resided at Rising Sun in Maryland and was in the lightning-rod business, that the prisoner had been in his employ in that business in the early

part of last July, and until a week before the Tuesday morning he went away with Mackey from Newark. And by Washington Bradley who lived in St. Georges', that he was in Newark on the 28th of July last, and was acquainted with the prisoner and deceased before that time, and saw them both there that morning about 9 o'clock at the Deer Park hotel, walking together and talking in a friendly manner as familiar acquaintances, and Mackey invited Taylor to take a ride with him into the town, but which he declined and soon afterwards walked with him down to the Washington House where Mackey's horse and carriage was then standing, and they were in the bar-room of it when he left it, and Samuel Garrett went into the bar-room with them. And they further proved by a large number of other witnesses who had known both of them many years that their relations had always been and were friendly as long as they had known him; and by John R. McBride, a first cousin of the prisoner residing in Bucyrus, that he had written to him three times between April and June last to come out there and work for him. He arrived there on the first day of last August, and was staying at his house when he was arrested about two weeks afterward.

Robert L. Armstrong, Sheriff, testified that the requisition for the surrender of the prisoner was executed by him, and that Mr. Hanmell applied to him to let him go out with him to Bucyrus to bring the prisoner back to this State, and pressed it upon him till he consented, but he heard no statement made to him by the prisoner, either there or on the route after they started back, and did not want to hear any. He would not permit the prisoner to talk to him about the case.

Hodgson, Deputy Attorney General, cited Regina v. Courvoirsier, Towns, Mod. St. Tr. 244.

Whiteley, for the prisoner, cited on circumstantial evidence in a capital case such as this was alleged to be. 1

Stark. Ev. 558, 570, 572. *Wills on Cir. Ev.* 173, 183, 187, 189, 192. And as to flight by a criminal from the scene and the vicinity of the crime. *Wills on Cir. Ev.* 174, 175. But the indictment alleged that the prisoner took the deceased in both his hands and threw him in the creek whereby he was drowned, and for the purpose of drowning him, and that the State should have proved, as it was alleged, but has not done it.

T. F. Bayard, for the prisoner. The *corpus delicti* must be proved as alleged in the indictment, either by direct proof, or by presumptive evidence of the most cogent and convincing character. 1 *Whart.* 284. 1 *Arch.* 893. *Rex. v. Hughes*, 24 *E. C. L. R.* 241. 1 *Whart.* 414. *Ros. Cr. Ev.* 705, 707. The evidence relied on for a conviction was entirely circumstantial, and to convict on such evidence the jury must be satisfied that the death of the deceased cannot be accounted for on any other reasonable hypothesis than that he was thrown alive into the water of the creek by the prisoner for the purpose of being drowned, and was thereby drowned in it. *Wells on Cir. Ev.* 69, 99, 111, 199, 214. 1 *Stark. Ev.* 510, 512. But this matter must not be left to supposition or conjecture merely, when it was susceptible, and so easily susceptible, of direct proof by ascertaining that he had been drowned, by a proper *post mortem* examination of the body, and particularly of the lungs, which would have shown whether he was alive or not when his body reached the water. And without having had that done, and without having resorted to every practicable means to ascertain and establish by direct and positive evidence that most vital and essential allegation in the whole indictment, the State was not in a situation to ask that it should be left to the jury to determine the grave question of fact involved in it on any evidence of a less certain and conclusive character, or to be inferred by them as a matter of supposition and conjecture merely. As to the confessions or declarations of the prisoner he cited 2 *Stark. Ev.* 516. 1 *Whart.* 252. *Wills on Cir. Ev.* 76.

Pennington, Attorney General, replied.

The Court, Wooten, J., charged the jury. I think I may be permitted to congratulate you, my brothers on the bench and myself on the approach of this protracted case to its final termination. When I speak of it however as a protracted case, I do not mean to say it has been very unnecessarily so. Its magnitude requires time and careful investigation.

Joseph H. Taylor the prisoner at the bar stands indicted for the murder of Robert A. Mackey, and of murder of the first degree, alleged to have been committed on the 28th of July last at Drawyer's bridge and creek in this county. It is charged in the indictment that the prisoner at the bar then and there with malice aforethought cast, threw and pushed Robert A. Mackey into that creek in which there was a great quantity of water, and that by and with the water the said Robert A. Mackey was choked, suffocated and drowned. To this indictment the prisoner at the bar pleaded that he is not guilty, and put himself upon God and his country, of which country you are, and the issue which you are sworn to try is, whether he is, or is not guilty in the manner and form as he stands indicted. It is proper for me to say, that under this indictment he may be convicted of murder of the first degree, or he may be acquitted as he stands indicted and convicted of murder of the second degree, or he may not be convicted of murder of either degree, but of manslaughter; but if you should be satisfied after a careful and full consideration of all the evidence and applying it to the law as I shall give it to you, that it is not proved sufficiently and beyond a reasonable doubt that he is guilty of murder of either degree, or of manslaughter, your verdict should be one of acquittal, this being the only offense of which he can be convicted under this indictment.

The case, gentlemen, is of great importance, as well to the community, as to the prisoner at the bar. The object

of the criminal law is not merely to punish those who violate it, but for the protection of society, and its pains and penalties are therefore held out to others as beacons of warning to deter them from the commission of like offenses. It is of course important to the prisoner at the bar, because his life is involved in, and hangs upon its issue. You have the evidence as given to you by the witnesses, and I shall endeavor to give you the law applicable to the case, as clearly and as briefly as I am able, and it will then be your duty to apply it to the evidence and upon the law as you will have it from the Court and the evidence as given to you by the witnesses and otherwise, and thus determine the guilt or innocence of the prisoner at the bar, without considering what may be the consequences to him, your duty being simply to find the fact of guilt or innocence.

The Judge then reviewed the evidence and added, I have not repeated all of it, and if I have not correctly stated such portions as I have referred to, you will correct me; my object in referring to it at all is merely to direct your attention to the proper line of your investigation, and have therefore only glanced over the outlines, leaving it entirely for you to judge of the evidence, and not only as to what has been proved, but of the weight and credit which you will give to it, which is your exclusive province, and I have no disposition to invade it. In considering the evidence, if it is conflicting you should **reconcile** all its conflicting elements, if you can, so as to harmonize it all, but if it should be so conflicting as to be irreconcilable, you must give credit to that portion, which you may believe to be most entitled to it, and reject such as you may think the least worthy of credit.

We come now to notice more particularly, the crime with which the prisoner at the bar is charged by the indictment, and the law applicable to it. The indictment charges that the prisoner at the bar on the 28th day of July last with express malice aforethought, cast, threw and pushed Robert A. Mackey into Drawyer's

creek at St. Georges' Hundred, in which creek there was a great quantity of water, and that by reason of such casting, throwing and pushing of the said Robert A. Mackey into the creek aforesaid, he was then and there choked, suffocated, and drowned, of which said choking, suffocating and drowning, he, the said Robert A. Mackey, instantly died. This the indictment alleges to be murder of the first degree.

The prisoner at the bar, through his counsel denies these allegations and insists that there is no proof of the *corpus delicti*, that there is no evidence that Mackey was cast, thrown and pushed into the creek by the prisoner at the bar, and they further insist that there is no evidence whatever that Mackey came to his death by choking, suffocating and drowning. These facts must be established by the evidence to the satisfaction of the jury beyond a reasonable doubt, which may be direct or circumstantial or presumptive. This case rests entirely on circumstantial or presumptive evidence, and you must draw your conclusions from all the facts and circumstances which are in evidence before you.

I will now, gentlemen, give you the law applicable to this case as clearly and as briefly as I am able. The prisoner at the bar stands indicted for murder of the first degree, and to determine the issue it is necessary that you should understand the nature and character of the crime, and what constitutes it. Murder of the first degree under our statute, is the killing a human being with what the law terms express malice aforethought, which is where one person kills another willfully and deliberately and with a formed design; such formed design being evidenced by some external circumstances indicating the concealed purposes of the heart, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party slain some bodily harm.

Every felonious murder is presumed by law to be malicious, and therefore murder, until the contrary appears from some circumstances of alleviation, excuse, or justi-

fication which must be shown by the prisoner by way of defense, or disclosed by the evidence on the part of the State. So that when the State has established the fact of killing, it devolves upon the prisoner to show that the circumstances under which the act was committed, are such as to render the crime below that of murder, unless the evidence on the part of the State discloses such facts and circumstances as will so reduce the crime. The Attorney General takes the ground, that the prisoner at the bar is guilty of murder of the first degree, or nothing. It so strikes us, but we do not wish to express any opinion in reference to his guilt or innocence. If your investigation should be confined to that issue, it would be unnecessary to explain to you, murder of the second degree, or manslaughter. I will however say, that murder of the second degree is when one person kills another without express malice aforethought, but with what the law terms implied malice, and which malice is implied by law from any deliberate, cruel act committed by one person against another however sudden, as when one person suddenly kills another, without any, or without a considerable provocation, not amounting however to such palliation, excuse or justification as would reduce the offense below the crime of murder of either degree, or excuse or justify the act of killing entirely. Homicide committed without malice either express or implied by law, does not amount to murder of either degree, because of the absence of malice, which is the essential element of murder. It is the distinguishing feature between murder and manslaughter.

I have said, and it is conceded, that this case rests entirely upon circumstantial evidence, and upon that it must stand or fall. Much has been written on this subject, and much said in this case. The rule however may be stated in few words and, perhaps, more satisfactory to the minds of the jury, than by more extended remarks. The rule is that circumstantial evidence must be of such a character as to exclude any other hypothesis, but that of the guilt

of the party. In such cases a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce. The *onus* of proof is on the State, to establish the *corpus delicti*, either by direct proof, or by circumstantial or presumptive evidence, and all the material allegations in the indictment must be so established to the satisfaction of the jury beyond a reasonable doubt. It must be proved first that the party alleged to have been murdered, is dead; secondly, that he came to his death as charged in the indictment, in this case, by choking, suffocation and drowning, for if it should appear that he came to his death in any other manner, the prisoner cannot be convicted under this indictment; and then it must be proved that the prisoner at the bar committed the act which resulted in his death. In this case there is no controversy about the death of Mackey, but it is denied that Taylor, cast, threw, and pushed him into Drawyer's creek, and that he came to his death by choking, suffocation and drowning. These facts we say to you must be proved beyond a reasonable doubt, and the evidence offered by the State being entirely circumstantial, they must be proved to the exclusion of every other reasonable hypothesis except that of the guilt of the prisoner. If they are not so proved the prisoner will be entitled to your verdict. But if the circumstances attending the case as proved before you, are such as to lead your minds to the conclusion of the guilt of the prisoner to the exclusion of every other reasonable hypothesis, it will be your duty to convict him.

If upon a full and careful consideration of all the facts and circumstances surrounding the case, you should entertain a reasonable doubt, growing out of the evidence, such a doubt as reasonable men would be constrained to entertain, the prisoner will be entitled to the benefit of that doubt.

Verdict—"Not Guilty."

THE STATE v. AARON K. WOODWARD.

On a trial of murder for killing a person who is merely trespassing on his lands at the time, is not competent for the prisoner to prove, in order to rebut the allegation of malice aforethought, either express or implied, that gangs of mauraders infested the neighborhood and often went armed, and were in the habit of frequently committing depredations on the farmers there, even in an open and defiant manner, taking their property and not only threatening, but actually resorting to personal violence against them when ordered from their premises, and that the prisoner was well aware of that fact at the time of the occurrence, unless it also appears that such personal violence was threatened, or committed upon him by the deceased or some of his companions so trespassing on his premises at the time of the shooting of him by the prisoner. Because no trespass merely on the property of another, real or personal, can reduce the willful killing of the trespasser by the owner of it, to the crime of manslaughter, or below the grade of murder of the second degree under the statutes, where it is done with a deadly-weapon, or instrument likely to cause death.

New Castle County, November Term, 1874. At a Court of Oyer and Terminer held at this term Aaron K. Woodward was indicted and tried for the murder of William T. Lukens of the first degree. The case was tried before Wootten, Houston and Wales, Associate Judges, Gilpin, Chief Justice, absent on account of sickness. The prisoner resided on a farm in Christiana hundred, a few miles from the City of Wilmington, upon which on the 6th day of October preceding there was a chestnut tree with ripe nuts on it growing in one of the fields about fifty yards from the public road leading by it, and on the trunk of which he had fixed a written notice only a few days before forewarning all persons against trespassing upon it, or his premises. One of the number named Edward Speakman, engaged in the trespass hereafter mentioned, and a witness for the State in the trial of the prisoner, on cross-examination testified that there were about twenty boys of them including himself in the city of Wilmington, some of whom, were in the habit of making weekly ex-

cursions on foot out of the city into the country round about it, at suitable seasons of the year, and of taking almost anything they could find without leave or license from the farmers in the neighborhood, but that day was the first time he had ever been himself in Mr. Woodward's field. The party that day consisted of six, but was larger than usual. He went with the deceased and four other boys out to the farm of the prisoner that day, and into his field and to the chestnut tree from the public road about 10 o'clock in the morning. The deceased and two others of them, John Skelly and William T. Green, went up the tree, while he and the other two remained under it. The tree was in full view of the prisoner's house, and about a quarter of a mile from it, and which was on higher ground than the tree, but when he first saw the prisoner he was in a run coming out of a piece of woods nearer to the tree than his house, with a double barrelled gun in his hand, and was hallooing to the boys to come down out of the tree, and who was then only about fifty yards from them. The witness then ran off from the tree and out of the field into the public road, where he stopped and looked back when he saw the prisoner, after he had reached the tree and the deceased had come down from it and was running off from it towards the woods, level and aim his gun from his shoulder at him and fire, and the deceased immediately fell in the field about ten yards from the tree. And which statement was substantially corroborated by the testimony of the other two who were under the tree with him, and fled from it to the public road on the approach of the prisoner. John Skelly also testified that he was the second, but did not remember which of the other two was the first to go up the tree, and the first he heard of the prisoner was his hallooing, but he did not see him until he got under the tree, when he raised a double barrelled gun and pointing it up the tree, told them if they did not come down, he would blow their brains out, when they told him if he would let them come down and would not shoot, they would do so and go off, and never come back any

more; and that the deceased as he went down the tree was crying and begging him not to shoot him, but just before he got down the prisoner struck him with a stick which broke, when they both jumped to the ground and ran off together towards the woods, the deceased a little ahead and to the left of him, when they were both shot, he in the left arm and the deceased in the back, and who at once fell, but he, the witness, ran on. Green who had not yet come entirely down from the tree also substantially confirmed this statement, and added that he saw the prisoner raise the gun to his shoulder, point at the deceased and fire and saw him fall. It was also proved that the ages of the boys varied from fifteen to nineteen years, the deceased being the oldest, but not the largest of them. The prisoner then walked to Lukens and helped him upon his feet, but he could not walk and he let him down again on the ground in the grass, and went to his house and soon returned with a horse and dearborn and one of his hired men, and put him in the dearborn and carried him to his house and laid him on a settee, and soon afterwards sent another of his hired men on a horse to Wilmington for a physician, with a request that he would come out to his house as soon as possible, as there was a boy there who had got hurt; in the meanwhile he and his wife and her sister living with them, doing the best they could to relieve him of the pain and prostration under which he was suffering; but the physician not arriving, and the boy all the while expressing a desire to go home to his mother, he was taken three or four hours afterwards by the prisoner and his hired man in the dearborn to his father's house in Wilmington, where he died the next morning between 9 and 10 o'clock.

The testimony of the physician was that he was called to see him about 3 o'clock P. M. on the 6th of October last, and found him in a very feeble and collapsed condition, and his pulse so fast and feeble that he could not count it, and that it would not do to administer chloroform, or to probe his wounds but slightly, until his system

had rallied somewhat, but it never rallied, and only grew weaker up to his death. The *post mortem* examination of his body made the next day disclosed that the wound was a gun-shot wound with small shot in the back below the shoulder blade, but mainly or more on the right than on the left side of the spinal column, and rather transversely across the back, and that seventy-two apertures made by that number of shot, were found in his back. The shot were all small shot, and that both the stomach and the left lobe of the lungs were penetrated by them; and that the wound of the stomach was necessarily fatal, and would have killed any boy or man.

The evidence for the prisoner was that there were a few shot recently fired apparently from a gun into the chestnut tree and scattered over a surface of about six inches up and down the body of it, and about four feet from the ground, and that it was thirteen yards from it to the place where the deceased fell after he was shot. That there had been the day before, and early in the morning of that day, a written notice placed on the body of the tree forewarning all persons from trespassing on the premises, and that after the shooting of the deceased, one of the boys was seen to go back to the tree and raising his hand up the body of it take or remove something from it, apparently, and in the afternoon there was no notice on it; and that the prisoner had always borne the character of a good and peaceable citizen, without any skill or practice in the use of a shot-gun, or other fire-arm.

During the examination of a neighboring farmer as a witness in the case, the following question was propounded to him by the counsel for the prisoner.

Do you know that gangs of marauders infested that neighborhood, and that they often went armed, and were in the habit of committing frequent depredations on the farmers there, even in an open and defiant manner, taking their property, and not only threatening, but actually resorting to personal violence against them when ordered

from their premises, and that the prisoner was well aware of that fact at the time of this occurrence?

Pennington, Attorney General, objected to the admissibility of it, both in form and substance.

T. F. Bayard, (*Spruance* with him,) contended that the evidence proposed was material and admissible to rebut, even the implication of malice, and more especially, the allegation of express malice that the act of shooting the deceased was committed by the prisoner with premeditation and deliberation, without provocation, or any excuse or mitigation of it.

The Court sustained the objection not only on the ground that the question was leading, but because evidence of the general fact sought to be proved by it, was not admissible in that case, unless such personal violence was threatened or committed on the prisoner at that time.

The Court, Houston, J., charged the jury. The indictment which you are now trying is against Aaron K. Woodward, the prisoner at the bar, for the murder of William T. Lukens in Christiana hundred in this county, on the sixth day of October last, with express malice aforethought, and consequently, of the first degree under our statute. It charges him with no other crime, but under it you may acquit him of the crime of murder in the first, and convict him of the crime of murder of the second degree under the statute, or acquit him of murder of either degree, and convict him of the crime of manslaughter; or acquit him entirely, according as the evidence shall warrant and require when you come to apply to the facts and circumstances proved in the case, the law on the subject as stated by the Court.

At common law the crime of murder consists of but one degree, the malice, however, which is always abso-

lutely essential to constitute it, is of two kinds, and are respectively termed, in the legal definition of them, express malice aforethought, and malice aforethought implied by law; and so far as this distinction is concerned, our statute merely makes the crime when committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death under our laws murder of the first degree, but when committed with implied malice aforethought, murder of the second degree, the penalty thereby prescribed for it being death, when it is of the first degree, and fine, whipping, pillory and imprisonment for life when it is of the second degree. At common law the penalty was death whether committed with express, or with implied malice, and therefore the distinction was practically of much less importance than under this modification introduced into it by our statute. Some of our sister States which have also modified it in this and other respects, have made the intention to kill, the gist, or the essential ingredient and criterion of murder in the first degree and punishable with death. We have however in this State no law defining or establishing the crime of murder of either degree, but the common law distinction as recognized here when our statute was enacted.

It must be observed, however, that when the common law, as well as the statute, makes use of the term malice aforethought in this connection, as the peculiar characteristic of the crime of murder, as distinguished from manslaughter and other grades of homicide, it is not to be understood in its ordinary sense or meaning, as denoting actual hatred or animosity entertained by one person against another, but as indicating that the killing is attended with such circumstances as are the ordinary symptoms of a wicked and malignant spirit, a heart regardless of social duty and fatally bent on mischief; and in general, any formed design of doing mischief may, in this sense, be called malice. And therefore not such killing only, as proceeds from premeditated hatred or revenge against the

person killed, but in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of malice prepense, or express malice aforethought, and consequently, murder with such malice at common law, and of the first degree under our statute.

The long established and familiar definition of express malice aforethought at common law, is when one person kills another with a sedate, deliberate mind and formed design, such formed design being evidenced by external circumstances discovering the inward intention, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. According to this definition it is not necessary that the design formed with a sedate, deliberate mind should be to kill, to constitute express malice aforethought at common law, or under the statute, but it is sufficient for that purpose, if the deliberate mind and formed design simply be to do the party some bodily harm, and his death ensues as the result of it. Implied malice, or malice implied by law; to constitute the crime of murder at common law, and under our statute, is when the act is not done with a sedate, deliberate mind and formed design, and is not so evidenced as before stated, but it is implied by law from any deliberate, cruel act committed by one person against another however suddenly without any, or without a considerable provocation, sufficient in law to negative the implication of malice in such a case; as where one person kills another suddenly, without any or without such a considerable provocation as is sufficient to negative such implication of malice, and to mitigate and reduce the killing to the crime of manslaughter, the next degree of offense in the descending grade of unlawful and felonious homicide; for in contemplation of law to constitute the crime of voluntary manslaughter, or an act of intentional killing of one person by another, the provocation and alleviation must be such as to negative both express and implied malice. The essential characteristics therefore which distinguish

the crime of murder with malice implied by law, and of the second degree under the statute, from the crime of murder with express malice aforethought, and of the first degree under the statute, on the one hand, and from the crime of voluntary manslaughter on the other, consist in the suddenness with which it is committed without any sedate, deliberate mind and formed design to kill, or to do the party some bodily harm, and without any, or without a considerable provocation sufficient in law to alleviate and reduce the killing to the crime of manslaughter as before mentioned.

The crime of manslaughter consists in the unlawful killing of one person by another without malice, either express or implied, as before defined, as when it is done suddenly in a transport of passion and the heat of blood upon a reasonable provocation such as the law has recognized in well considered and adjudged cases, without premeditation or previously formed design, and without any other hatred, malevolence or animosity than such a provocation was naturally calculated to incite under the circumstances attending the act; for in such a case the law in its benignity and indulgence for the common weakness of our nature, considers it solely imputable to human infirmity, and not to malice in the sense in which it is employed with reference to the crime of murder at common law, or of either degree under our statute. But the provocation to have this effect must be of such a character as reasonably to produce such a sudden transport of passion, or heat of blood, as to impel the party without premeditation or previously formed design, and before he has had time to cool or for reason or reflection to regain control over the transport of passion which impels him to the commission of the act. But the law, even in its benignity and indulgence for this common infirmity of humanity, does not consider any provocation, whatever, as sufficient to negative or rebut the existence of express malice when it satisfactorily appears from the evidence in the case, or even, the implication of malice when the facts and circum-

stances proved clearly warrant it; and therefore the law and the decisions on this point go to this extent only, first, in case of a mutual combat or fight between the parties, not preconcerted between them, as in a duel, and one of them, in the heat of blood produced by it suddenly kills the other without premeditation, and before there is sufficient time for the passion to subside, it will be but manslaughter; and yet, even in such a case, though there is not time for passion to subside, if it be attended with such circumstances as indicate malice aforethought in the slayer, he will be guilty of murder at common law, and of the first or second degree under our statute, according as the jury may find the malice to have been either express malice aforethought, or malice implied by law, as before defined by us. In all other cases where the killing is done upon provocation, it must appear that the provocation was considerable, and not slight only, in order to reduce the offense to manslaughter; and in general, without an assault actual or menaced on the person of the party killing, the provocation will not be sufficient to reduce it to manslaughter, if a deadly weapon be used: but if the fatal stroke is given by the hand only, or with a small stick or other instrument not likely to produce death, a less provocation will suffice to reduce the offense to manslaughter. Thus, the killing has been held to be only manslaughter, though a deadly weapon was used, where the provocation was pulling the nose of the party killing by the party killed; so where one person meets another on the street and intentionally and rudely jostles him to one side, and the latter in the heat of blood suddenly kills him with a deadly weapon, the provocation has been held sufficient to reduce such killing to manslaughter. So where a boy having had a fight with another boy and been badly beaten by him, ran home bloody and crying to his father, who immediately seized a rod or stick not likely to produce death, and ran three-quarters of a mile to where the other boy was, and struck him one blow on the head with it, of which he afterwards

died, the provocation was deemed sufficient to reduce the offense to manslaughter. But even, where the provocation has been given by a blow too slight to reduce the killing to manslaughter, yet if it is accompanied by words and gestures calculated to produce a degree of exasperation equal to what would be caused by a violent blow, it has likewise been held to be sufficient to reduce the offense to manslaughter. There are also other provocations recognized in law to be sufficient to reduce the offense of killing to manslaughter, as in the special case expressly provided for in our statute where the killing is by a husband of a person found in the act of adultery with his wife, and another kind of provocation which sometimes arises in the execution of process by public officers, as where the process is essentially defective or illegal, or is being executed in an illegal manner, and the party in protecting and defending himself against the arrest, kills the officer, the provocation will be sufficient to reduce the killing in such case to manslaughter. But these, and some other cases of a similar character which might be mentioned, will be found to constitute the only cases in law in which any provocation given, or any wrong done by one person to another, (not sufficient to entirely excuse or justify the killing of the former by the latter,) in which provocation with or without heat of blood, has been held sufficient to reduce the homicide to the grade of manslaughter.

But in all these cases of voluntary homicide upon provocation and in the heat of blood in which they have been held sufficient to reduce the killing to manslaughter, it must further appear from the evidence that the fatal blow was given or wound inflicted before the passion originally raised by the provocation, had time to subside, or the blood to cool; for it is only to human frailty that the law allows this indulgence, and not to settled malignity of heart. If, therefore, after the provocation, however great it may have been, there is time for passion to subside, and reason to resume its sway before the mortal

blow or wound is given, it will be murder, as we have before said, and not manslaughter. And upon this point it is also further to be observed that in such cases of homicide as we have just been speaking of, upon provocation, or in a sudden fight between the parties, if there be evidence of actual malice, the offense will also be murder, as we have before remarked, and not manslaughter. It must therefore appear that the chastisement, or act of force intended on the part of the slayer, bore some reasonable proportion to the provocation received, and did not proceed from brutal rage or diabolical malignity. Proof of great provocation is requisite to extenuate the offense and reduce it to manslaughter, where the killing is by a deadly weapon, or by other means likely to produce death; but if no such weapon or means be used, a less degree of provocation will suffice.

But inasmuch as it has been contended by the counsel for the prisoner, that it is incumbent upon the prosecution to prove and establish to the satisfaction of the jury, the guilt of the prisoner to the extent of either murder of the first or second degree, or of manslaughter, or he must be acquitted, we must say to you that if you are satisfied from the evidence in the case that the prisoner shot the deceased, William T. Lukens, in the manner alleged in the indictment, and that his death the day afterward was the result of that shooting, the fact of such killing, particularly, as it was done with a shot gun, a deadly weapon, is presumed in law to have been committed by him with malice, and to be murder with implied malice, and of the second degree under the statute, unless you are also satisfied from the evidence that he did it in the heat of blood and upon a provocation given him by the deceased sufficient in law to rebut this implication of malice, and to reduce the killing to the offense of manslaughter.

We have already, however, sufficiently stated and explained to you the nature and character of the provocation which is required in law for this purpose, and we will therefore now say to you that no mere trespass or aggression

on the real or personal property of another, and no such wrong or injury committed on them, as was then being committed by the deceased and his companions on the premises of the prisoner, however annoying or provoking they have been to him, could constitute in law a sufficient provocation to reduce the killing of such a trespasser or wrong-doer by the owner of the premises from murder to manslaughter, when it is done with a deadly weapon, or with any other means likely to produce death. And no notice or warning posted anywhere on the premises forbidding all persons against trespassing upon them, and no statute of the State, if there be such, making such trespasses indictable misdemeanors, could have any effect, either directly or indirectly, to vary or modify this well settled principle of law on the subject.

On this particular point the law is so clearly stated in a work of high authority on crimes as recognized at common law that we will read it. Where A, finding a trespasser upon his land, in the first transport of passion, beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but merely to chastise him, and to deter him from any future commission of such a trespass. For if A had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir, the accused, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one that did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died, being indicted for murder he was convicted and executed. It seems, therefore, adds the author referred to, that it may be laid down that in all cases of

slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or do some great bodily harm, such homicide will be murder. 1 *Russ. on Crimes*, 519. And yet, with the practical distinction introduced by our statute, as the malice prepense is implied from such circumstances in such cases, and there was provocation, but not such as was sufficient to reduce the homicide to manslaughter, it would constitute murder committed with implied malice aforethought, and of the second degree only under the statute. This principle of the common law which we have just stated was recognized and ruled in *Halloway's Case* where a boy was trespassing with others in a park and was caught by Halloway, the Woodward of it, up a tree with a rope tied around his body and one end of it hanging down, and cutting boughs from the tree with a hatchet, who on his coming down by his command tied the end of the rope to the tail of the horse on which he was riding through the park, and without any resistance on the part of the boy, struck him two blows on his back with his cudgel, which caused the horse to run away and drag him on the ground, by which he was killed; and in which case all the judges of England held, with one dissenting opinion, that inasmuch as there was no resistance made by the boy, the law in such case implies malice, and that the killing was murder with implied malice aforethought. *Cro. Car.* 131.

Of course, gentlemen of the jury, all that we have said to you on the law of this case, proceeds and is predicated upon the presumption that the shooting of the deceased, William T. Lukens, by the prisoner at the bar, was wilfully done by him, and if you are so satisfied from the evidence, and that his death was the result of that shooting, then it was unlawfully done, and the law consequently presumes that the killing was committed with malice by him, unless you have evidence before you in the case sufficient in law according to the exposition which we have given you of it on the subject, to satisfy your minds

to the contrary; and of which under the solemn sanction of your oath and the grave and solemn duties devolved upon you as jurors in the case, you are now the sole and final judges between the prisoner and the State. If, however, you have any evidence before you to satisfy you that the shooting of the deceased was not willfully and intentionally done by the prisoner, it will be your duty to acquit him entirely. And furthermore, if after fully and conscientiously considering all the facts and circumstances proved in the case, you should have a reasonable doubt of the guilt of the prisoner, it will be your duty to give him the benefit of such reasonable doubt.

Verdict—"not guilty."

THE STATE *v.* DANIEL O'NIEL.

A peace-officer or policeman of a city in making an arrest for a mere misdemeanor has no right to kill the offender, except when it becomes reasonably necessary in a case of resistance to the arrest; nor has he a right when in pursuit of a person who is fleeing from arrest for a misdemeanor merely, to shoot at him to prevent his escape, and if he does so and kills him, it will be murder, and not manslaughter; but the law is otherwise when the arrest is for a felony, for in such case, if in the pursuit he shoots and kills the fleeing offender, and could not overtake and arrest him without shooting him, the killing will be justifiable.

And if such an officer in the pursuit of a person fleeing from arrest for a mere misdemeanor, shoots at him with the deliberate intention of killing him, or doing him some great bodily harm, but misses him and kills another person, his offense will be the same as if he had shot and killed the fleeing offender, and will be murder, and not manslaughter.

New Castle County, November Term, 1875. At a Court of Oyer and Terminer held at this term, Daniel O'Niel was indicted and tried for the murder of Sarah Doyle in the second degree, in the city of Wilmington, on the tenth day of June preceding. The prisoner was at the time a

sergeant of police, and with two other police officers of the city had a warrant for the arrest of a man named Wingate who had previously given them no little trouble, for resisting an officer five days before that in his effort to arrest him for disorderly conduct, and who was now seeking to elude their arrest for that offense. Between nine and ten o'clock in the morning of that day he came in sight of him on Church street, and as he at once started in a run from him, he gave pursuit, twice calling to him to stop, but as he paid no attention to it he drew his pistol, a five barrel revolver, from his pocket and fired two shots at him in quick succession, as they were both running as fast as they could up the street, the first whilst he was on the eastern side of it and twenty-five or thirty yards behind Wingate who was then in the middle of it, and the second soon afterwards whilst they were both in the middle of the street and were running rapidly up it. The course of the first bullet was obliquely across and up the street, and soon after it was fired, the deceased, a girl between thirteen and fourteen years of age, who was at the time sweeping dirt from a back yard out at the gate of it on the opposite side of the street some two hundred yards from the place where it was fired, was found lying mortally wounded and unconscious in the back yard, and who expired in a few moments afterwards. The physicians who conducted the *post mortem* examination, testified that her death was produced by a medium sized pistol bullet of conical shape, which had entered her head about two inches below her right ear and penetrated it in a horizontal direction to the depth of three inches, and was found embedded in the lower brain. It was also in evidence that it was afterwards found on testing it, to fit the pistol owned and used by the prisoner on that occasion. No one saw her shot or fall, as she was within the enclosure of the yard and entirely out of view of the several witnesses who saw and described the chase and the shooting with more or less discrepancy in the details of it, and the direction in which the pistol was pointed

when first discharged by the prisoner, for it was evident from the testimony of all of them that it could not have been the result of the second fire; and a map of the locality and the surrounding objects prepared for the trial by the city surveyor with his explanation of them, made it difficult to apprehend how it could have been the result, even of the first without a deflection of the bullet from its original direction by contact with some intervening object in its course, as the grade of the street and the the natural surface of the ground rose as much as ten or twelve feet from the position of the prisoner to that of the deceased when both shots were fired, while there was a tight board fence five feet high between them and within some forty or fifty yards of the place in the yard where the deceased fell; and yet, a careful search had failed to discover any trace or indication of the bullet's having hit or touched it any where in its course.

Robinson, Deputy Attorney General. As Wingate was fleeing from arrest for a misdemeanor merely, and not a felony, the prisoner as a sergeant of police with a warrant to arrest him for it, had no lawful authority, or right whatever to fire a pistol at him to prevent his escape by simple flight from him, and as he fired it a second time at him and was very much incensed against him on account of his previously disorderly conduct, as well as by his effort then to escape from him, the evidence he thought clearly showed that he shot both times directly at him with the intention to kill him, or at least, to so cripple him as at once to stop his flight; and if Wingate's death, instead of that of the unfortunate deceased, had been the result of either of them, it would unquestionably have been murder with implied malice, at least, and of the second degree under the statute. 1 *Russ. on Crimes*, 543, 544. And it was also a principle of law equally well settled, that if a party shoots at one person, but misses him and shoots another, his offense would be the same as if he had shot the person he intended to shoot; and in this case, if the

prisoner had killed Wingate whom he intended to shoot, it would have been murder of the second degree at least, his killing of the deceased under the circumstances proved constituted that offense.

Lore, for the prisoner. It was incumbent upon the State to prove to the satisfaction of the jury beyond a reasonable doubt, that the prisoner at the bar killed and murdered Sarah Doyle, the deceased, with malice aforethought implied by law; but which the prosecution had failed to prove as a fact by any evidence sufficiently clear and certain to establish it beyond a reasonable doubt. If the first bullet discharged from his pistol, the only one which possibly could have hit her, could possibly have reached her at a distance of not less than two hundred and fifty yards from him, when it was fired from the pistol, over an intervening elevation of twelve feet in the natural surface of the ground, and over or through two intervening pale or picket fences, and lastly over or through a tight board fence five feet high within forty or fifty feet of where that young girl of thirteen years of age was then standing in her mother's back yard, and which she was then sweeping, it must have been fired intentionally much above the head of Wingate, then not more than twenty-five or thirty yards from him, and must have described and passed through a very considerable parabolic curve in its flight to have reached and hit her in that enclosed yard; and if such was the case, then it was self-evident that it could not have been fired with any intention on the part of the prisoner to hit or shoot Wingate, but simply to stop him in his flight, as was often and usually done with the first shot from their pistols by arresting officers in such cases; and if so, then it would completely negative the idea of the allegation of malice aforethought, either express or implied, on his part against Wingate at the time he so fired it in the air, and designedly above his head with such a motive, and for that purpose merely. And if he was not chargeable with malice in either degree

as against Wingate in committing the act, there could, of course, be no ground whatever, either in law or fact for charging him with malice of any kind against the deceased in committing it.

Pennington, Attorney General, replied, and in reviewing the evidence adverted, particularly, to the testimony of Wingate who stated that when the first shot was fired at him, he heard something like the whizzing of a pistol bullet pass near his ear.

The Court, Gilpin, C. J., charged the jury, that the case was of great importance in more respects than one, and involved a charge of murder of no ordinary character, as it was against a public officer specially charged with the preservation of the public peace, and the protection of human life and the security of persons against all unlawful violence in the city of which he was a duly appointed and authorized policeman, for an act alleged to have been committed by him under a mistaken view on his part of his official authority as such, and alleged in the indictment to constitute a crime of no less a grade than that of murder of the second degree under the statute. Of all men, such officers are bound to be prudent and circumspect in all matters pertaining to the security of the lives and persons of its citizens against all unauthorized force and violence, however humble, or even lawless in their character they may be.

All public officers are presumed in law to know and understand their official powers and duties, and as they often impose hazardous, as well as grave responsibilities upon them, in the proper exercise and performance of them, they are always acting under the sanction and the protection of the law. But when they exceed their powers they are held to a strict account for it according to the consequences of it. Where an officer has authority to arrest a person and uses proper means to execute that authority, and is resisted and killed in the effort to arrest,

it will be murder by all who take part in the resistance; and they may repel force by force, and resort to whatever force is necessary to overcome the resistance in such a case, and if in such a conflict the party resisting the arrest be killed, the law will hold it to be justifiable and protect the officer. But the officer must not proceed to extremities, until there is a reasonable necessity for his so doing; and in case of an arrest for a misdemeanor merely, and not for a felony, nothing short of resistance reasonably requiring it, will justify the officer in killing the party resisting, and if in attempting to make an arrest for a misdemeanor simply, he kills the offender where there is no resistance, it will be murder. Where he is in pursuit of a felon, or one who has committed a felony with power or authority to arrest him, and he cannot overtake him, he may kill him to prevent his escape from him, and it will be justifiable in law; but where he is in pursuit of a person charged with a misdemeanor merely, and has a warrant to arrest him, and cannot overtake him, he is not justified in killing him to prevent his escape from him, and if he does, he will be guilty of murder.

In this case, O'Niel, the prisoner at the bar, was in pursuit of Wingate, with authority and a warrant as a policeman of the city of Wilmington, to arrest him for the offense with which he was charged, of disorderly conduct and resisting an officer in a previous attempt to arrest him on the 5th of June, five days before that. He was therefore charged with a mere misdemeanor under that complaint, and not with a felony; and even if he had been charged with a felony, the officer would not have been justified in killing him, if he could have overtaken him and arrested him without shooting him. If an act unlawful in itself, such as shooting at a person charged with a mere misdemeanor who is fleeing to escape arrest, is done deliberately with the intention of doing great bodily harm to him, and his death ensues from it, without the officers intending it, or even against his intention, it will be murder, because the act intended to be done by

him would be unlawful and felonious. And a ball which is fired from a gun or a pistol at one person with intent to wound or kill him, carries with it the ingredient of malice when it strikes and kills another and different person. In other words, if A unlawfully and deliberately shoots at B and misses him, but kills C, this is just as much murder as if he had shot and killed B, or had entertained the malice against C, because the act and injury intended to be committed by him was an unlawful act of violence, without justification or excuse, and was committed in utter disregard of the safety of others, and therefore carried with it the implication of malice; and it is implied from the unlawful and felonious attempt to kill another, or to do him some great bodily harm by wounding him. And the evidence of such an attempt and such an intention to kill or do great bodily harm, is only the stronger and more conclusive whenever a deadly weapon is used.

Such gentlemen, are the rules and principles of the common law and the law of this State applicable to the case, a law which we have inherited from our English ancestors and which has received the approval of every State in this country. And it is now proper that I should say to you that if you are satisfied from the evidence that the prisoner at the bar, Daniel O'Niel, shot at Alfred Wingate, and that the ball discharged from the pistol at him, struck and killed the unfortunate girl, Sarah Doyle, you should find him guilty of murder in manner and form as he stands indicted. But if you shall not be satisfied from the evidence that her death was caused by a ball discharged from the pistol in the hand of the prisoner, then your verdict should be one of acquittal. For he is either guilty of murder, or guilty of no crime whatever under this indictment. It is not a case of manslaughter.

And you thus perceive that the only material question for you to consider and determine is purely one of fact. Did the shot fired by O'Niel at Wingate cause the death of Sarah Doyle? And upon its proper solution and determination by you depends the momentous result of your

deliberations as to the guilt or innocence of the prisoner at the bar. Now, gentlemen, I trust I may be permitted, in view of the facts disclosed to you by the witnesses, to express the hope and expectation that you will bring to the consideration of this case, a conscious sense of the solemnity of the occasion and of the serious nature of the duty you have been called upon to perform. It is your duty to recall to your recollection all the facts and circumstances in evidence in the case. The reason why the police force was in that neighborhood that morning; the relative positions of O'Niel, Wingate and Sarah Doyle when the shots from the pistols were fired, and the relative distances between them when they were fired, and any variance or conflict in the testimony on those points, and the distance such a pistol would carry. Some of the witnesses heard but one shot, some two, and one of them three shots. Sarah Moore, living next door to the deceased heard but one shot. The uncertainty or doubt as to which of them killed her, if there were three shots fired. That O'Niel fired but two shots seems to be settled by the concurrent testimony of nearly all the witnesses, and no one saw him fire more than twice. And I deem it proper to say further to you that the preponderance in the weight of evidence on the side of the prosecution in a criminal case is not of itself sufficient to warrant the jury in finding a verdict against the accused, but that in this case it must be proved to your satisfaction beyond a reasonable doubt that one of the balls fired by O'Niel, the prisoner, caused the death of Sarah Doyle, the deceased; and if you have a reasonable doubt on that point, the prisoner is entitled to the benefit of it.

Verdict—"Not Guilty."

THE STATE *v.* JOHN RHODES.

Where one is assaulted, upon a sudden affray, and in defense of his person where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant, it is excusable homicide committed in self-defense, and constitutes no crime or offense in law. But to have this effect it must be shown that the slayer was closely pressed by the other party, and that he in good faith and with the honest intent to avoid the violence of the assault, retreated as far as he conveniently or safely could; and the jury must be satisfied from the proof that unless he had killed his assailant, he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm. .

Voluntary manslaughter is where one kills another in heat of blood, and usually arises from fighting, or provocation, and from the sudden heat of the passions; but in the case of fighting in order to reduce the crime from murder to manslaughter, it must be shown that it was not preconcerted, and that there was not sufficient time for the passion to subside; and although there was not time for the passion to subside, if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder.

Murder with express malice and of the first degree, and with implied malice and of the second degree under the statute defined.

As before stated a man may defend himself against an assailant where he cannot escape from him, but he cannot do it as he pleases; for if one be assailed with the fist, he cannot defend with a club, or deadly weapon, because the defense is altogether disproportioned to the assault; and if in such defense, death ensues, the law implies malice from the character of the weapon used, and the party is guilty of murder. So if a party assailed has escaped from his assailant, and then returns to him and attacks and kills him, he becomes the aggressor, and is guilty of murder, from the malice displayed. For whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes it was done with malice, and in such case it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense does not amount to murder.

Express malice is proved by evidence of a deliberate formed design to kill another, which may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, a previous grudge, &c.

The law fixes no measure to the time for the premeditation required to constitute the killing murder. The intent to take life may arise with but very little reflection.

Where a person in the heat of passion upon such provocation as would produce in most persons a very high state of excitement, kills another as the result of such heat merely, and not of prior hatred or ill-will, the offense is not murder, but manslaughter.

New Castle County, May Term, 1877. At a Court of Oyer and Terminer held at this term, John Rhodes, negro, was indicted and tried for the murder in the first degree, of James Temple, negro, in New Castle hundred, on the 21st day of April preceding, before Comegys, Chief Justice, and Houston and Wales, Associate Judges, Wootten Associate Judge, absent.

On empanelling the jury to try the case when Mr. Samuel G. Holmes, one of them was called to the box to be sworn, *Mr. Bird, Attorney* for the prisoner waived the right to propound the usual question in such cases to him, whether he had formed and expressed any opinion touching the guilt or innocence of the prisoner in the case.

Mr. Pennington, Attorney General. As the counsel for the prisoner had seen proper to waive the right to ask that question, and as no juror was qualified to sit in the case who had formed and expressed such an opinion, he would now claim the right on behalf of the State to propound that enquiry to Mr. Holmes, and ask the Court for permission to do it.

By the Court. According to the long-settled practice of the Court in such cases, the counsel for the prisoner may waive his right to put the question to any juror, but that confers no right on the State or the prosecution to ask it, in case he declines to propound it. The State can put its own questions to the juror, but not his, if he sees proper to waive them.

The dead body of Temple was found on the night of that day lying on the road and causeway leading from

Market street bridge in the city of Wilmington south towards New Castle, with an irregular shaped fracture of the outer table of the skull an inch and a half in length and an inch in breadth, on the left side and near the top of the head, three or four inches above the left ear and a little to the rear of it. The bone was denuded and slightly fractured, but which in the opinion of the medical witness was not necessarily mortal, and with the neck cut from ear to ear through the skin, flesh, veins, arteries and wind-pipe to the vertebræ which were laid bare by the cut, and which was six inches in length and two in depth across the throat which seemed to have been made by several strokes or gashes with a knife; and with also another cut through the lobe of the left ear and along the left jaw six inches in length and a half an inch in depth, and another across the fore and middle fingers of the left hand.

- The body was found lying in the middle of the road about thirty yards from the southern end of the causeway with a pool of blood in the middle of the road where it lay, and a piece of slag near it with marks of blood on it; there were tracks in the road about the body with the print of a bloody hand on the top rail of the fence on the western side of the causeway, nearly opposite to the place where the body lay, but there were no marks or indications in the road of any scuffle or struggle having occurred there.

The State further proved by a negro woman named Lucinda Duckery, that she lived with her parents beyond the southern end of the causeway, and was at that time at service at a restaurant in Wilmington, and was acquainted with both the prisoner and the deceased, that they both visited her father's house, and that her father then worked for the deceased in his business. That he came to the restaurant that morning with some things in a market basket and said her father had told him to get the marketing and to leave it there for her to take out in the evening when she went home, and at the same time he presented her with a bunch of fish. He then left there

and she did not see him again until after he was dead. That John Rhodes, the prisoner, came there that night when she was getting ready to go home, about 9 o'clock she supposed, and walked with her to the outer end of the causeway and the forks of the roads where he bid her good-by, turned back and started towards town, and she went on home. She then proceeded and stated when she first learnt at her home that night between 11 and 12 o'clock, that there was a dead man lying on the causeway, and going with her mother and two other persons to see it, they both recognized it to be the body of James Temple, the deceased. On cross-examination by Mr. Bird she admitted that she and Rhodes, the prisoner, had been intimate and that she had had two children by him, but denied that she was ever married to him, or had ever lived with him as his wife, and stated that she had no conversation with him that night about Temple, except that when they were about to separate at the end of the causeway, he asked her what she was in such a hurry for, and she told him it was because she wanted to get home, he said to her that she must suppose that Jim Temple was at her house, and must want to see him, to which she replied no, she did not, and that Temple was not at their house.

The father of the preceding witness next testified among other things, that the prisoner and the deceased were not friends, and were always abusing and cursing each other when they met, but he hardly knew what it was about.

The following day a white handled barlow pocket-knife was found in the ditch along the side of the causeway with the blade open and blood upon it, near where the body lay when first discovered in the road, and which was recognized by another witness, a negro woman, as being very much like one of the same kind of knives which the prisoner had lent her the Thursday morning before at her house to pare her corns with, and finding it very keen while using it she said to him "why John, this knife is as sharp as a razor"! He said "yes, and by G—d I keep it so." And soon afterwards handing it back to him

he strapped it on the sole of her slipper, and then said, "I am going to show some d—d dirt with this knife." And about the same time the knife was found, the tracks of a man moving with long strides across the soft surface of the meadow on the western side of the causeway, and obliquely from the line of it towards the city, were also found and followed in that direction till they crossed a deep ditch, by the police officer who had discovered them, and who then returned into the city and proceeded with two other police officers to the residence of the mother of the prisoner, at 310 East Sixth street where they found him and arrested him for killing the deceased; and where they also found a pair of pants, a vest and a shirt which had some marks of blood on them, and were wet, and had the appearance of having been washed. He was committed to the city hall cells to await the coroner's inquest.

A witness, Peter S. Blake, testified that he had known the prisoner four or five years, and called to see him soon after he had learnt of his arrest and commitment to the cells of the city hall, and proceeded to relate a conversation he then had with him on the subject of the charge on which he had been arrested, after stating that he made no promise or threat whatever to induce him to say what he did to him about it.

Mr. Pennington, Attorney General. The witness was examined in regard to the same matter before the jury on the coroner's inquest when the conversation was fresh in his memory, and as his testimony in regard to it was then reduced to writing by the coroner's clerk, he asked the Court that the witness might be allowed to take the deposition and use it for the purpose of refreshing his memory merely.

Mr. Bird objected.

The Court held that it was not within the letter of the rule governing such applications, and in such a case they

would not extend it, and therefore declined to allow it.

The witness then stated that the prisoner first said to him that he knew nothing about the killing, and he replied that he did not believe he did. He said he could prove that he was in Hedgeville. But when he started away the prisoner called him back and said to him that he had heard that they had got some of his clothes, and say they are wet and muddy, and then said if his mother was there he could give satisfaction on that point, and asked him if he would tell his mother to come up. He asked a policeman if his mother could see him, but he said no, and he then went back and told him he could not see his mother. He said "that's bad"! and he replied "yes, the whole thing was bad." He then said he would like to see his mother to get that thing fixed up, and he then told him the suspicion had fallen on him pretty strong, and seeing that he wanted to say something to him, he went up to his cell door, and said to him, "John, did you do this thing or not." He said "well, I know you, and I will tell you all about it. I did do it, but it was in self-defense." To which he replied that depended on circumstances; and the prisoner then told him that on Sunday two weeks before that night Temple lay in wait for him along the causeway with two brickbats or stones in his hands, but he saw him and ran and got away from him, and that on the Saturday he was killed, he went out with Lucy Duckery on the causeway to the forks of the road, and after he had turned back from there and was coming towards town, he met him going out on the other side of the causeway, and knew who it was as soon as he saw him, and tried to get by without being observed by him, but Temple saw him, and run across the road towards him with his right hand in his inside coat pocket and said to him "you s—n—of—a—b—h! I've got you now, and I'm going to kill you"! At that moment he saw a stone shining in the road, picked it up and struck him on the head with it, and went up to him and found his knife in his hand, and as Temple had tried to take his

life, he thought he had as much right to take his life, and he then said he saw something skinning on the ground by the side of Temple, and picking it up, found it was a knife, and without saying then anything further about it, he next said he then went to the ditch and washed his hands, and he believed he said he lost the knife in the ditch, but he was not certain as to his recollection about that. He then said that Temple was alone when he killed him, and that he raised up his hand, but put it down again, and it was after saying that he told him that he took the knife and cut him, and cut his throat. After Temple was down he said "you've got me now you s—n—of—a—b—h, put it on me;" and that after he was dead he said that he went and washed his hands in the ditch, and then went across the ploughed field west of the causeway to the bank and along the bank to Market street bridge, and from there home.

Peter J. Babcock, the coroner's clerk at the inquest on the body of the deceased, was also examined as a witness and proved that the prisoner made a voluntary statement without threat or inducement before it, which he reduced to writing, but which was not read to him, or signed by the prisoner, nor was he asked to sign it; and the substance of which he then proceeded to state from his recollection of it, and which corresponded with the statement already given in most of the particulars of it, except that he said on the latter occasion that when Temple ran at him across the road on the causeway he had a big stone or brick-bat in each hand, and that he started to run from him, but struck his foot against something, and stooped down and picked up a piece of slag or cinder and struck and knocked him down with it, and then started again to run, but stopped and went back to him, saw something white lying on the ground by the side of him, found it was a knife with the blade open, picked it up and cut him three or four times across the throat with it. Temple said to him, "you've got me now, put it on me, you

s—n—of—a—b—h"! That he then went to the ditch and washed his hands in it, and then across the field to the bank, and round on the bank to Market street bridge, and then home. The piece of slag found near the body, and the knife found in the ditch, and here produced in Court, were then shown to him, and he said the slag looked like the piece he struck him with, and recognized the knife as the knife he cut him with. He also stated that he had on a slouch hat and when he was meeting Temple on the causeway, he pulled it down over his face to prevent him from recognizing him, and he had got nearly by him, when he turned suddenly round towards him and said to him "you s—n—of—a—b—h! you need not try to hide your face. I know you, and I've been lying for you, and now I've got a good chance I'm going to kill you this night. There's no one around here, and I'll fix you," and then run across the causeway towards him, and as he came at him he dropped his arms and ran his hand in his pocket; and then followed what he, the witness, had already repeated. He further said that Lucy had nothing to do with it. No one knew any thing about it but himself. That he did not expect to meet Temple, and had no knife or weapon about him when he met him. That the knife he cut him with he supposed was Temple's, as he found it open by his side where he fell.

It was further proved by the State that the deceased had a five-barreled pistol in his inside coat pocket with some of the barrels charged, and that it was found in it the night he was killed, by Lucinda Duckery and her mother, when they first went to see the body in the road after they had learn't there was a dead body lying in it, and who were the first to recognize it as the body of Temple; and by the testimony of a witness named Thomas Demby that he was standing talking with the prisoner at Front and Market streets two or three weeks before Temple was killed, when he passed by them and said something to him, and after he had passed, Rhodes said to him "that's a d—d ornery son of a b—h, and if I had my way I'd kill

him," but he did not think much of it, as he did not know then that they were on such bad terms.

The evidence for the prisoner was that he and Lucinda Duckery had lived together as husband and wife at her father's, and that she had declared herself to be his wife, until after an improper intimacy had taken place between her and the deceased, who was a married man although he no longer lived with his wife on account of it, and who was not only in the habit of openly declaring his improper attachment to Lucy, but of cursing and abusing and denouncing the prisoner for no other reason than the fact that he had been her recognized husband up to that time, and had frequently threatened to kill him; and that in the month of March preceding, while she and the prisoner were at the house of a friend who lived in Hedgeville, and were in the front room when the deceased came along and looked into the window, and immediately commenced cursing the prisoner, and said to him now that he had found him in Hedgeville, to jump on him, but the prisoner replied that he did not want to jump on him, he then said to the prisoner that he was going to make him, and took a pistol out of his pocket and snapped a cap of it, and then went out in the middle of the street and cursed him and raved a good deal, whilst the prisoner staid in the house and said nothing; but after a while he slipped out at the door into the street and started away, when the deceased came round the corner of the house and again cursed him, and said to him he would shoot him, and after that he, the prisoner, would have to watch him. The witness of this occurrence also stated that the prisoner was a peaceable man, and folks called him a coward because he would not take any little thing up, and the first time she ever heard him and the deceased quarrel was in front of her house, and then there were no blows struck, but they took it out in cursing each other. The bad feeling between them was all about Lucinda, and she never heard them quarrel about any thing else. She had told her that she was Rhode's wife, and she was considered by those who knew them to be his wife.

Another colored woman testified that she had known them both since she was a girl, and one time when she was sitting at a front window she heard persons running on the pavement and looked out and saw Rhodes coming and Temple after him, and just opposite the window Temple stumbled and fell down, and she then saw that he had an open razor in his hand; and that she had often heard him make threats against Rhodes. That on the morning before Temple was killed he came to her house and asked if she had seen Rhodes that morning, and said that every time Rhodes could get a chance he was slipping over to Duckery's to see Lucy, and was always after her money, and he intended to put his light out, "a yaller s—n of a b—h!" She then asked him why he acted in that way and why he didn't go home and stay with his wife who was a nice woman and he said he would lose his life for Lucy, and then pulled a pistol out of his pocket, and said that was his big dog, and that it never lied on him. At the time first referred to by her, Rhodes lived with Lucy as her husband at her mother's in Hedgeville, and after that Rhodes told her he was going away, because Temple deviled him so that he had no peace of his life, and that in March last he went to Philadelphia to stay, but Lucy got her to write a letter to him for her as his wife, as she could not write, and to tell him that she wanted him to come back, which was done in the latter part of that month. The letter was produced and read in evidence, and bore date the 24th of that month. Testimony to the like effect was then given by six or seven other witnesses, and among them one who stated that he knew both of the parties well, and that he was raised with Rhodes at Smyrna in this State, and that he had always been a quiet and peaceable person; and that he knew he had a white-handled barlow knife a good deal like the one there shown him, and then in evidence, for he had several times borrowed it for a few minutes to cut his fiddle strings with, the last time on last Thursday, but the blade of it was rounded, and not sharp at the point like the one

shown him; and that it was not the same knife, though a good deal like it.

Charles Cook was sworn and stated that he worked for Temple at the time he was killed, and was also acquainted with Rhodes. That on the Saturday night he was killed he walked in with Temple from Hedgeville to town along Front street, and that he stopped at the restaurant and tapped on the window for Lucy, but she had left. Temple then asked him if he saw any thing of Rhodes anywhere abouts; he told him he had eyes as well as he had; well, he said he didn't see him, but he expected to meet him over the bridge that night, and he was prepared for him. He asked him how he was prepared, and he then took his pistol out of his pocket and said there was something that never lied on him. They then walked on to Market street, and Temple there left him and went on over the bridge; and it was then about 9 o'clock at night. It was also proved that the deceased was a very muscular and able-bodied man, and much more so than the prisoner; and in conclusion the counsel for the prisoner proved that he had on that day entered into a contract to work for several months with a carter in Wilmington.

Robinson, Deputy Attorney General, contended that the fact that the prisoner fled from the scene of the homicide by a circuitous route across the meadows, and at first denied any knowledge of it, was not only inconsistent with his statement that the deceased first assailed him and that he killed him in self-defense, but it proved that the act was committed by him with premeditation and express malice aforethought. But even admitting his statement to be true, it could not be otherwise in contemplation of law, or less than murder of the first degree, because it was not necessary for his escape and security from the threatened attack, however imminent and perilous it might have been before that, after he had cracked his scull and knocked him down and left him lying prostrate

and senseless in the road, that he should have stopped and gone back and killed him by cutting his throat with repeated gashes from ear to ear, and until he had cut his head nearly off; for it was that which killed him, as the physicians had testified that the fracture of the skull was not necessarily mortal. And as the stopping and going back and proceeding in that manner to despatch him as he lay senseless on the ground, with the reflection which he says then occurred to him, that as the deceased had tried to take his life, he thought he had as much right to take his life, was wholly unnecessary for his own safety, it not only stripped him of any legal excuse or justification on the ground of self-defense, but it was evidence from his own lips of such coolness and deliberation as would constitute express malice aforethought.

Bird, for the prisoner, on the contrary, contended that it was manifest from all the evidence that his meeting the deceased on the causeway that night was wholly unexpected by the prisoner, for he believed when he turned back at the forks of the roads to come into town, that Temple was then at Duckery's house beyond the point where he turned back; but had he expected to meet or encounter him that night, or premeditated such a thing as lying in wait for him to make an attack on him there, on one so much superior to him in physical strength and power, it was quite as certain that he would not have been without any other weapon or means for it than a piece of slag picked up on the road, and an ordinary barlow knife in his pocket, if even he had such a knife about him at the time. It was, therefore, evident that their meeting was, at least, entirely unexpected by him. But how was it as to Temple? The testimony of the witness, Charles Cook, would show that he was not so unprepared for such a meeting, either in point of expectation, or in weapons for it, or in determination to make a hostile one of it in case they should meet that night anywhere between Market street bridge and Duckery's house. He must have crossed

the bridge that night on his way out to Duckery's house, not long after Rhodes and Lucy had crossed it, going in that direction, for he and the prisoner met in thirty or thirty-five yards from the forks of the roads where the prisoner turned back, and Temple doubtless knew that they were together and not far ahead of him on the causeway; and as he well knew that the prisoner was not then allowed to enter Duckery's house, he would have to turn back, at least, when he got there, if not before. And if there was any expectation of a meeting, or any lying in wait on the road by the one for the other with malice aforethought, which of them under such circumstances and under all the evidence which the jury had heard in the case, would it be most reasonable to believe was guilty of it? If such was the case, then all the evidence in it would lead irresistibly to the conclusion that Temple was the man, and would confirm the statement of the prisoner as to the manner in which the collision had occurred that night between them. The probabilities were all in favor of it; and if they rejected his account of it, he could not conceive how they could, under all the facts proved, reasonably account for the commencement of it in any other way. And if at such an hour and in such a place he made a sudden rush at him across the road with the declaration that now he was going to kill him, and with his hand in his inside coat pocket where the evidence shows that he had a loaded pistol, and with no power on the part of the prisoner to escape from the threatened bullets of it, had he not the best and strongest reason for believing that his life was in imminent peril, or that he was, at least, in the greatest danger of being instantly shot by him? And if the jury were satisfied that he had good reason for believing so, then it was in law a case of justifiable killing in self-defense, and the prisoner should be entirely acquitted of any offense whatever. Whether the fracture of the skull was, or was not a mortal wound, was not a question to be considered, because it could not now be decided by

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the jury, or by the Court, or by anybody else. In all probability it was a fatal wound, and was sufficient of itself to have caused his death, if he was not in fact entirely dead when his throat was cut. But whether that was so or not, if he was justified in law in killing him in self-defense when he struck the blow upon his head and broke his skull, then what he did afterwards by way of despatching him, could not make it murder with express malice aforethought, or with even implied malice, but manslaughter only; for if it was necessary for his own safety and protection for him afterwards to have done that, then it was a case of killing on a sudden, unprovoked and perilous assault made upon him by the deceased, in which the provocation would unquestionably have been sufficient to reduce to the crime of manslaughter at least, if not to a case of justifiable homicide in self-defense.

As to his hasty flight from the scene of it, and his denial at first of all knowledge of it, that might be reasonably and satisfactorily accounted for consistently with his positive allegation from the first moment that he admitted it, that he did it in self-defense, on several grounds. In the first place he was an ignorant man, and had but an imperfect apprehension of the legal consequences of the terrible act which he had just committed, as was manifest from the simple remark which he made in vindication of it, and which was that as Temple had tried to take his life, he thought he had as much right to take his life, without seeming to know that it was because Temple had no right to try to take his life, that he had a right under the circumstances stated by him to take his life. In the next place it was evident that the killing was quickly done, and was as much a work of sudden terror as of bitter vengeance and inflamed passion on the part of the prisoner; and then that he was frightened and appalled at the apprehended consequences of it to himself; that he had killed a man, and if it should become known that he did it, he would have to be hung for it, and if charged with it, that there was no one who could prove him innocent of it.

And as for any discrepancies which appeared in his two statements made at different times and before different witnesses of them, they would be found to be in relation to matters of minor importance, and such as might readily have occurred under such circumstances, but they would be found to be substantially the same in all their essential details. His own firm belief was that the killing had occurred substantially as the prisoner had stated it, without any premeditation, deliberation or design, or any expectation whatever on his part of meeting the deceased on the occasion, until he encountered him on the road and he suddenly rushed at him in the threatening and alarming manner stated by him; and as his honest effort had been to establish the truth of that statement and his assertion that he did the act in self-defense, he had called a number of most respectable witnesses to prove his well-known character for peace and good order, and also a witness to prove that he had that day entered into a contract with him to work for him several months, as he thought it would tend to show that up to that time he could have had no expectation whatever that any such terrible calamity was so soon to befall him.

Pennington, Attorney General. The confession or statements of the prisoner, though put in evidence by the State, were not to be considered for that, or any other reason by the jury, as entitled to credit and belief, except so far as the facts and circumstances satisfactorily proved in the case independent of them, should warrant their belief in the truth of the statement; and the Court would not only so instruct them, but would further inform them that they might believe so much of the confessions as made against the prisoner, and reject or discredit so much of them as made in his favor, except so far as they were sustained by other evidence produced, if after duly considering all the facts proved in the case, they should see proper to do so. But it was neither his duty, nor his inclination to do more than to make such use of them, as all the facts

and circumstances established by the evidence in the case would reasonably and justly warrant. He would admit that without them the State might not have been able to prove in so clear and satisfactory a manner, how the prisoner killed the deceased, although the evidence, independent of the confessions, would have been amply sufficient to sustain the allegations in the indictment as to that matter to the satisfaction of the jury.

Then coming to the facts proved in the case on behalf of the State, which were but few, the first he would call their attention to was that the eyesight of the deceased was impaired and imperfect, and was inferior to that of the prisoner, and as the prisoner must from his own statement have recognized the deceased before the deceased recognized him, as they were approaching each other at that hour of the night on the causeway, why did not the prisoner at once turn aside from it, or even turn back upon it, as soon as he saw and recognized him, if he was afraid of him, or was anxious to shun or avoid meeting him, particularly at such an hour and in such a place so far removed from any human habitation? The next fact proved to which he would call their attention was that the deceased was struck with the piece of slag or cinder on the left side of the head three to four inches above the ear and a little to the rear of the ear, and with so much force as to fracture the outer table of the scull an inch and a half in length; and looking at that fact he would ask how it could have been done, if the prisoner either threw it at him, or struck him with it in his hand, while he was rushing towards him across the road, or while he was standing facing him after he had started to run from him, struck his foot against it, suddenly snatched it up from the ground and wheeled round in time to strike him with it as he came at him, and fell him to the earth before he had time to get his pistol from his inside coat pocket, although according to his statement his hand was in his pocket before he had found the slag unexpectedly at that remarkably opportune moment for him. He thought he

could safely say that neither by a throw of it, nor by a blow of it in his hand, would it have been possible for him while facing the deceased to have dealt him a blow with it on that part of his head with sufficient force to fracture the skull of such a stout and robust negro man; for standing in such a position and facing each other, the blow in either case must have struck that portion of the head at such an angle as would have much impaired and weakened the force and effect of it. Besides the fracture itself, and the depression of the fragments of bone produced by the blow, clearly served to show that it must have impinged directly upon that portion of the skull, and when the left side of the body and head of the deceased was turned directly towards the face of the prisoner, and must have been thrown with great force directly against that side of his head and while he was in the act of passing the prisoner unseen on that side of him. The proof was that there were gate-posts on the side of the road, and his own belief was that the prisoner had taken his position by one of them when he discovered the deceased approaching, and wholly unobserved by him gave him the fell blow with the piece of slag on the side of his head just as he was in the act of passing him in that unobserved position. He was probably expecting, the moment the blow was delivered, to have to make a run for it to get out of the way of both his wrath and his pistol, and may have started at that instant, but finding the success of his aim and the effect of his blow much more signal than he probably expected, he at once perceived that the time and opportunity had come for glutting his vengeance in the life-blood of his prostrate body as it lay on the ground, and before it could recover from the effect of that blow, and he then proceeded deliberately to cut his throat in the effectual and ferocious manner stated by him, and as described in the testimony which the jury had heard. And with this correction made in them, there was probably not much error or falsehood contained in the statements of the prisoner in regard to the

matter, although there were some material inconsistencies in the invention of the two which showed the inherent fallacy of both of them in the account which he had attempted to give of it.

And to the question, what prompted him to kill the deceased under those circumstances and in such a blood-thirsty manner, there could be but one answer, and that was malice, express malice beyond the possibility of a doubt. The prisoner had never been married to Lucinda Duckery; that had been clearly proved. But if he had been, his jealousy of the deceased, however well-founded could have constituted no excuse or justification, or extenuation even, of the killing of him under such circumstances; for nothing short of the killing of a man in the act of adultery with a lawfully wedded wife by the husband, can reduce it below the crime of murder to the offense of manslaughter; nor could any threats, however frequent or violent made by the deceased to shoot or kill him, furnish any excuse or justification for it in law. In no event could it be considered a case of either self-defense or manslaughter, or of even murder of the second degree, and he should therefore be convicted in manner and form as he stood indicted.

The Court, Comegys, C. J., charged the jury. The duty we are now engaged in is the most important that devolves upon society as an organized body, that of deciding whether a state of things has arisen that justifies it in sending one of its members to his long account. The passage of laws for the government of men's conduct in the ordinary concerns of life, however important such affair may appear to be, is one of the functions of civilization so familiar, and of such frequent exercise, as to occasion no notice of an extraordinary kind; but when that attribute of society which has concern with the question of the right of one of its members longer to live, or rather with its duty to protect itself against him as its foe, is to be exercised, then the attention of every one is

aroused; for human life is so precious, and so sacred, that all feel it is not to be taken away, or rendered entirely useless by imprisonment for life, without the most urgent necessity, and upon satisfactory proof. Society, the body politic of Delaware, is now, through its appointed tribunal for the decision of a question so awful, acting in such a case. This Court, and you gentlemen, are assembled, with John Rhodes, the prisoner at the bar before you, to decide whether or not his life is forfeited to the criminal laws of this State, and though the important duty is cast upon the Court of deciding, and instructing you what the law is, by which you are to be governed in making your decision, so far as the law itself is an element thereof, yet it is with you, and with you only, to pronounce upon the guilt of the prisoner and the grade of it, or whether he is in fact guilty at all. This is a most responsible duty, gentlemen, to be performed by you, as we feel sure it will be, under a high sense of its obligations, and according to the dictates of an enlightened conscience. We know that you will allow yourselves to be influenced by no considerations of vindictiveness or false humanity; but that you will say, without hesitation, that the prisoner is guilty, or innocent, as you find the fact to be.

It is proper gentlemen that you should be fully informed of the law of homicide or manslaying, before you enter upon the duty of determining what your judgment shall be upon the facts; so that you may apply that law to the facts, and ascertain what is the grade of the offense that has been committed by the prisoner, if in fact, he has committed any legal offense at all.

And it is proper, also, gentlemen, that we should say to you, that you have nothing to do with the consequences of a verdict against the prisoner; they fall upon society, and your responsibility is to discharge yourselves of the issues in this case honestly and truly according to the evidence.

All homicides, that is, all acts of killing men, are of three kinds, and three only in law; first, justifiable; second, excusable; third, felonious.

1. Justifiable homicides are such and such only as are committed, first without any will, intention, or desire, or any inadvertence or negligence in the party killing, and therefore without blame; such as by sheriff executing sentence of death by hanging a criminal in strict conformity to law in every particular; or secondly, for the advancement of public justice, as where an officer, in the due execution of his office, kills a person who assaults and resists him, or where a private person, or officer, attempts to arrest a man charged with felony and is resisted, and in the endeavor to take him, kills him, or if a felon flee from justice, and in the pursuit be killed, when he cannot otherwise be taken, or if there be a riot or a rebellious assembly, and the officers or their assistants, in dispersing the mob, kill some of them, where the riot cannot otherwise be suppressed, or if prisoners in jail, or going to jail, assault, or resist the officers, while in the necessary discharge of their duty, and the officers, or their aids, in repelling force by force, kill the party resisting; or thirdly, for the prevention of an atrocious crime attempted to be committed by force, such as murder, robbery, housebreaking in the night time, rape, mayhem, or any other felony against the person. But in such cases the attempt must be not merely suspected, but apparent; the danger must be imminent, and the opposing force or resistance necessary to arrest the danger, or defeat the attempt.

2. Excusable homicide is that which is committed, either first by misadventure, which is where one doing a lawful act unfortunately kills another; as if he be at work with a hatchet and the head flies off and kills a bystander; or if a parent is correcting his child, or a master his apprentice, or scholar, the bounds of moderation not being exceeded either in the manner, the instrument or the quantity of punishment; or if an officer in punishing a criminal, within the like bounds of moderation or within the limits of the law, and in either of these cases, death ensues; or thirdly, in self-defense, which is where one is

assaulted, upon a sudden affray, and in the defense of his person where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills the assailant. To reduce homicide in self-defense to this degree, it must be shown that the slayer was closely pressed by the other party, and that he in good faith and with the honest intent to avoid the violence of the assault retreated as far as he conveniently or safely could.

The jury must be satisfied from the proof that, unless he had killed his assailant he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm. This latter kind of homicide is sometimes called chance-medley and closely borders on manslaughter. In both cases it is supposed that passion has kindled on both sides and that blows have passed between the parties; but the difference lies in this, that in manslaughter it must appear either that the parties were actually in mutual combat when the mortal stroke was given, or that the slayer was not at that time in imminent danger of death; but that in homicide excusable by self-defense it must appear either that the slayer had not begun to fight, or that, having begun, he endeavored to decline any further struggle, and afterwards being closely pressed by his antagonist he killed him to avoid his own self-destruction. There are other kinds of excusable homicide, but as this case cannot be classed, under any circumstances, with either of them, it is not important we should further refer to them.

3. Felonious homicide, which is of two kinds, namely, manslaughter and murder, the difference between which consists chiefly in this, that in murder there is the ingredient of malice, while in manslaughter there is none. Manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart; and it is of two kinds, voluntary and involuntary, but it is of the former, or voluntary manslaughter only, that in this case we are called upon to speak. It is de-

finer to be where one kills another in heat of blood; and this usually arises from fighting, or provocation. In the case of fighting, in order to reduce the crime from murder to manslaughter, it must be shown that the fighting was not preconcerted, and that there was not sufficient time for the passion to subside, for in the case of a deliberate fight, such as a duel, the slayer and his second are murderers. So much with respect, to manslaughter; though we may add that although there was not time for passion to subside, yet if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder. Thus, if the slayer provide himself with a deadly weapon beforehand in anticipation of the fight, and not for mere defense of his person against a felonious assault; or if he take an undue advantage of the other in a fight; or if, though he were in the heat of passion, he should designedly select out of several weapons equally at hand, that which alone is deadly, it is murder.

Murder, which is the other kind of felonious homicide, is when a person, of sound memory and discretion, unlawfully kills any reasonable creature living under the peace of the State, with malice aforethought, either express or implied. In this State, there are two degrees of such crime of murder, that is, murder in the first, and murder in the second degree. Our statute upon that subject says: "Every person who shall commit the crime of murder with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree, and of felony, and shall suffer death. Every person who shall commit the crime of murder otherwise than is set forth" above, "shall be deemed guilty of murder of the second degree."

Having thus read the definition from the statute of murder in the first degree, it is proper, as you are allowed in cases of indictment for murder, to find the prisoner guilty of murder in the first or second degree, or of manslaughter, that we should inform you what is murder in

the second degree. Murder in the second degree is where the malice (necessary in any case to make up the crime of murder) is an inference or conclusion of law upon the facts found by the jury; and among these the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises the presumption of malice. Thus if one attempts to kill or maim A, and in the attempt, by accident, kills B, his dearest or darling child; or if one, in the attempt to procure abortion, causes the death of the mother; or if in a riot or fight, one of the parties accidentally kills a third person who interfered to part the contestants and preserve the peace, the law implies malice, and the slayer is guilty of murder. And though other agents intervene between the original felonious act and its consummation, as if A gives poisoned food to B intending that he should eat it and die, and B, ignorant of the poison, and against the will and entreaty of A, gives it to a child, who dies thereby, or is voluntarily tasted by an innocent third person, by way of convincing others of his belief that it is not poisoned, as in the case of an apothecary into whose medicine, prepared by him for a sick person, another had purposely mingled poison, the law implies malice, and holds the wrong-doer guilty of murder. These are the familiar examples of implied malice given in the books of authority, and illustrate what is meant by our law when it provides that all cases of murder, other than with express malice aforethought, shall be murder in the second degree. These are cases of such murders.

It is not disputed that the prisoner at the bar slew James Temple, for he has confessed it more than once; but it is his plea for such act that he was acting in self-defence. Was he, or not, so acting? That is a question fraught, to him, with the most momentous consequences, and you alone are to settle it. When does the law allow

one man to kill another in self-defense? The definition we have already given to you, determines that. It is where one is assaulted upon a sudden affray; and in the defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. But to reduce homicide to this degree, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently could, in good faith, with the honest intent to avoid the violence of the assault. The jury must be satisfied that, unless he had killed his assailant, he was in imminent and manifest danger, either of losing his own life, or of suffering enormous bodily harm. With this exposition of the law of self-defense, you are to determine whether, or not, it was necessary in the case you are trying, that the prisoner at the bar should take the life of James Temple, either to save his own life, or avoid receiving enormous bodily harm. The fact that Temple was slain and by an antagonist, and that antagonist John Rhodes, is absolutely certain, for his dead body was found, and Rhodes admits that he slew him; and in his confessions which are in evidence by the testimony of Peter J. Babcock and Peter S. Blake respectively, he claims that, he did the act in self-defense and states, in substance that he met Temple on the night of the 21st of April last near the end of the causeway leading out of Wilmington to this place, and near the forks of the road, as he was returning to the city from an escort of the witness, Lucinda Duckery, towards her home; that he saw Temple approaching on the opposite side of the way and drew his hat over his forehead, or eyes, to avoid being recognized by him; that Temple, however, saw him and advanced towards him across the road with language as follows: You son of a bitch I've got you now, and I intend to kill you, or similar words, at the same time placing his hand upon his inside breast pocket; that he, Rhodes, started to run away from him, and in so doing struck a

stone, or slag, or cinder, with his foot; that he picked it up, and turning upon Temple struck him with it and felled him to the ground; that he then started again to run away, but came back and saw something shining in Temple's hand, or on the ground (and it is not exactly certain which he said) which was a knife, and that with it he cut the throat of the deceased. The physician, Dr. Ogle, who was called by the coroner to examine Temple's body, describes the wounds given by Rhodes, first, that by the slag (for I suppose we may treat the piece of slag before you as being the first weapon used) which consisted of a wound upon the head, about three or four inches above the left ear, of the length of about one and a half inches, a breadth of about one inch, with a ragged edge, and deep enough to reach the skull, the outer plate of which was broken so much that the fracture could be felt by his finger very distinctly; second, that by the knife, which was a horrible gash extending from ear to ear under the jaws, with one stroke partly on the left jaw, and severing the neck, with the muscles, arteries and windpipe, back to the verterbræ, or spinal column, a wound, which Dr. Ogle informed you, appeared to have been made by several strokes of a knife, and which the prisoner himself stated to Blake, according to his testimony, required three or four such strokes; and Babcock states that the prisoner admitted in his presence that they were given with the Barlow knife in proof before you. As confirmatory proof of that, the life blood of Temple yet stains the blade.

Now, gentlemen you have the facts of the killing and from the mouth of the prisoner; and we say to you, that if they cannot be considered by you as consistent with the theory of self-defense, then they are the evidences of one of the most malignant and diabolical crimes that has ever occurred in this State. Now, what made it necessary, taking the confessions of this unfortunate prisoner to be true, that he should assail James Temple at all? With the means of escape at hand—the open, unobstructed,

wide road, and the adjoining fields—was there any imminent and manifest danger to the life or limb of Rhodes? It was night, and the eyesight of Temple bad; besides, when Rhodes saw him he was on the other side of this wide road, and, it may be supposed, not very close to him, for, unless the night was very cloudy, there was light enough to see at a distance, where the eyesight was good; the moon being in her first quarter, and, at that time, two or three hours high. He must have been at least 40 or 50 feet away when seen by Rhodes. If Rhodes, therefore, had reason to fear the designs of Temple, (which, witnesses have sworn to you, were deadly, and known to Rhodes,) why did he not, instead of contenting himself with pulling his hat over his eyes, to avoid discovery, take himself out of the way, as he might very well have done? Why run the risk of an encounter with such a powerful man as Temple is shown to have been, if he could have avoided it? Still, he is not to be deprived of his plea on that account alone; for he had the privilege of the highway, as well as all others; and according to the statement of the woman, Lucinda Duckery, supposed Temple to be at her father's house. We think it but just to him to say that we have no thought that he meditated the murder of Temple when he separated from his former mistress that night. But, whether this be true or not, he is none the less guilty of murder in the first degree, if his plea of self-defense should fail him. Let us look a little more at that, in the light of the law. A man may defend himself against an assailant where he cannot escape him; but he cannot do it as he pleases. For example, if one be assailed with the fist, he cannot defend with a club, or deadly weapon, because the defense is altogether disproportionate to the offense; and if, in such defense, death ensues, the law implies malice, from the character of the weapon used, and the party is guilty of murder. So, if a party assailed has escaped from his assailant, and then returns to him, and attacks and kills him he becomes the aggressor, and is guilty of murder, from the malice displayed. For malice,

let me say to you, gentlemen, means that general malignity which proceeds from a heart void of a just sense of social duty, and fatally bent on mischief, and whenever the fatal act is committed, deliberately, or without adequate provocation, the law presumes it was done with malice, and in such case it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense does not amount to murder. Express malice is proved by evidence of a deliberate formed design to kill another, which may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon knowing it to be such, a previous grudge, &c. So also if one should, in self-defense strictly, overcome his assailant so that he might escape from him without difficulty, but should, after having started away from him, return and take his life by the use of a deadly weapon, and especially if he should, in giving an account of such, his transaction state, as his motive for returning, that his assailant had tried to take his life, and he, the party accused, had the same right to take his. In all these hypothetical cases, gentlemen, the party would be, in law, as much of a murderer with malice aforethought, and therefore guilty of murder in the first degree by our law, as if he had deliberately given poison to his adversary or had laid in wait for him and shot him. For the character of the alleged resistance would stamp it as not having been made in good faith, and with the honest intent to avoid the violence of the assault. And further, gentlemen, the conduct of a party who kills another in self-defense, in good faith, is usually, though not always, open and frank; in fact he seeks to make known what he has been compelled to do, and be justified by his fellow-men. In this case, however, it appears that the prisoner fled from the dreadful scene across the fields, reaching his mother's house by a circuitous route—for the prints in the soft earth of the meadow correspond exactly, as a witness swore to you, with his shoes; and afterwards whilst under arrest at the Town Hall, of Wilmington, he

stoutly denied for some time that he knew anything about the killing, and alleged he could prove himself to have been at that time elsewhere—at Hedgeville—more than a mile distant: and this too, to a friend who sympathized with and believed him. These circumstances do not seem consistent with innocent slaying; but still they are not conclusive against it; for men in the terror succeeding the doing of a fatal deed (however innocently) are sometimes betrayed into expressions, or conduct, implying guilt. It is possible that the acts and conduct of the prisoner are consistent with innocence, but barely so under the most favorable circumstances. And referring to the means of self-defense, we say to you that the law does not demand of the accused the same deliberate judgment in defending himself which the jury can exercise in reviewing the circumstances of the killing; but only that he should have actually and reasonably believed that the only way to protect himself from immediate danger was to kill his adversary. But this must be a reasonable belief, and the jury are to judge whether it were reasonable or not.

Now, gentlemen, let us consider some other things, or proofs, in this case. It is in evidence before you that a very bad state of feeling existed between the prisoner and the deceased, growing out of their relations to each other with respect to the woman Duckery; and that Temple carried a pistol habitually and threatened at various times to shoot Rhodes with it, of which threats Rhodes had knowledge. Whether the latter was in much dread of him on that account, you can only judge from the testimony, and that is for you alone to pass upon. We will not express any opinion upon that point, but we will say this much, that if one for whom another carries a pistol and who is threatened with its use upon himself, kills his adversary, who is in the act of drawing it upon him, instantly, where he had no other probable means of protecting himself, it is no murder, but self-defense. But it devolves upon him to prove, from the circumstances, that

he could not get out of the way, or could not protect himself in any other way than by killing; or such killing, if intentional, will be murder, being characterized by that evil disposition which is itself malice.

And, also, it must be said to you, as something for this wretched man, that the law presumes every man to be innocent until he is found to be guilty, and that proof is upon the accuser, in this case, the State. And you should also give full consideration to the fact that Rhodes is found to be a man of peaceable, orderly character and to be so known and considered by his friends and neighbors.

Take his case into your hands, gentlemen. If, after you have fairly and conscientiously examined it, (always inclining, as you should do so far as the evidence will allow, to the side of innocence,) you should have a well-founded reasonable doubt that the prisoner exceeded the bounds of self-defense as we have shown you the law concerning it, you should give him the benefit of that doubt, and acquit him, otherwise you should convict him of murder in the first degree. And, also, if from what we have said, and what you have heard from the mouths of the witnesses, you should conscientiously believe that the prisoner is not guilty of murder in the first degree, and yet not innocent entirely, you may convict him of murder in the second degree, or of manslaughter.

After the jury had been in their room an hour and a half in deliberation on their verdict they requested further instructions from the Court upon points of law suggested in a written communication from them, and on returning to their seats in the Court room were further instructed by the Chief Justice as follows: Gentlemen:—We have received two communications from you asking for instructions upon points of law, and we have sent for you in order to give you such instructions upon those points as may appear necessary and proper. The first question you ask is, "What length of time before committing a murder is necessary to constitute it a case of premeditation?"

Now upon this we have to say to you that in a case of attack made or attempted by one man on another, the attack may be repelled by that other; but he must use such means only as are necessary, and then only when he has no probable means of escape from his assailant. But if he exceed the means in such manner as to evince an evil disposition, and killing ensue, and such killing were not necessary for his protection at the time, this would be such an act as denotes a purpose or design of taking life, and would constitute the offense a murder. There must, in such case, have been premeditation, though but for a short time, and the law fixes no measure to the time. The intent to take life may arise without much reflection; in fact, with but very little.

The second question which you have submitted to us is, "Can a person who kills another in the heat of passion, be convicted of murder in the first degree?"

To that question we will say that where a person, in a heat of passion, upon such provocation at the time as would create in most minds a very high state of excitement, kills another as the result of such heat merely, and not of prior hatred or ill-will, the offense is not murder, but manslaughter.

Verdict—"Guilty."

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE *v.* JOHN McDANIEL.

Notwithstanding the statutes enlarging the rights, powers and liabilities of married women in respect to matters of contract, and exempting them when trading in their own names in goods, wares and merchandize from taking out retailer's licenses therefor where the purchases are less than one thousand dollars per annum, their legal relations and liabilities remain the same as heretofore in respect to crimes and misdemeanors committed by them.

A husband living in the same house with his wife so trading in and selling intoxicating liquor without a license therefor, is liable on a indictment against him for it.

Kent County, Court of General Sessions, &c., October Term 1877. The defendant, John McDaniel, was indicted for selling intoxicating liquor without a license therefor under the statute of the State. For the defendant it was proved that the liquor in question was sold by his wife who was keeping a small store in her own name, and as the sole and separate owner of the goods in it, and for which she held a U. S. Government license issued to her in her name. It also appeared from the evidence in the case that she and the defendant were living together as husband and wife in the house in one of the rooms of which the store was kept by her, but that he had nothing

to do with the store, and was not present when the liquor was sold by her, and that he had often remonstrated with her against selling intoxicating liquor.

For the defendant it was contended that in such a case the wife, and not the husband, was indictable for selling the liquor, particularly, since the passage of the act of the legislature enlarging the rights, powers and liabilities of married women, and expressly empowering them to engage in and carry on such business with all the legal rights and liabilities in relation to it, of single or unmarried women. *Rev. Code 370, Sec. 2. 2 Russ. on Crimes, 21, 23.* They might have been indicted jointly, and he might have been alone convicted of the offense, but he alone could not be indicted and convicted of it.

The Court, Comegys, C. J., charged the jury, that notwithstanding the statutes referred to enlarging the powers and liabilities of married women in matters of contract, and exempting them when trading in their own names, as well as unmarried women, in goods, wares and merchandize whose purchases are less than one thousand dollars per annum, from taking out retailer's licenses therefor, they were in law, still subject to the control of their husbands as heretofore, so long as they lived with them, in respect to what should or should not be done by them in their own houses wherein they live together as husbands and wives, and particularly, to prevent and prohibit them from committing a public offense against the laws of the State; for it was no part of the purpose of either of those statutes to alter or modify the legal relations or liabilities of married women, as heretofore recognized and established in respect to any crime or misdemeanor committed by them.

Verdict—"Guilty."

Pennington, Attorney General, for the State.

Reed, for the defendant.

THE STATE v. HENRY SEYMOUR.

A declaration made by a party within a few moments after he has shot another and fled from the scene of the shooting, that it was done accidentally or unintentionally by him, is not admissible in evidence as a part of the *res gestæ*.

On a trial for an assault and battery with intent to kill and murder, the intent must be proved as any other material fact alleged in the indictment, in order to sustain it.

Kent County, Court of General Sessions, &c., October Term, 1877. Henry Seymour, negro, was indicted for an assault and battery committed on James Brown, negro, with intent to kill and murder him. Brown was a servant at the Capital Hotel in Dover, and in the morning of the 4th day of July preceding, passed from within to the kitchen door of it where another negro man and the prisoner, standing just outside of it, were talking to a negro woman, the cook at the hotel, who was standing in the door of it, and jocularly said to them as he stepped to the door, he did not want them to interfere with their women there, when the prisoner replied to him, "you don't, don't you, you damned son of a bitch?" and instantly raised and fired a pistol at him, the bullet of which struck him in the forehead between and partly above his eyes, and which it was supposed for several days would prove to be a mortal wound. It had been probed for soon after he was shot, but had not been found and was still somewhere in his head, and had so paralyzed his left side that he was yet unable to walk without assistance. The prisoner immediately fled and endeavored to conceal himself, and was not arrested until an hour afterwards.

Watson, for the prisoner. The defense would be that the shooting was accidental and entirely unintentional, and that the prisoner had so declared within two minutes afterwards, voluntarily admitting at the same time that he had shot Brown to one who before had not even heard of the occurrence. He then called a witness and stated

that he proposed to prove by him the fact which he had just announced, and if he could do so, then the declaration constituted a part of the *res gestæ*, and as such was admissible in evidence. *Mitchen v. The State of Georgia*, 11 Geo. 614. *Redden v. Spruance et al.* 4 Harr. 217. *Russell v. Prison*, 19 Conn. 205. *Little v. The Commonwealth*, 25 Vir. 921. *Handy v. Johnson*, 5 Md. 451.

Pennington, Attorney General, objected to the admissibility of the evidence, because the declaration if proved, was not a part of the *res gestæ*. What may be so in one case, will not be so in another. If in the case before the Court the prisoner had instantly made the declaration to the persons at hand, and before he fled from their presence and the scene of the bloody act committed by him, it would have been a part of the *res gestæ*, and admissible in evidence. *Arch.* 405.

The Court excluded the proposed evidence and remarked that as it appeared from the statement of the counsel that the witness he proposed to call did not see the shooting and knew nothing of it until the prisoner made the declaration to her, how could she know of her own knowledge in what time it was made after the shooting, or how could she tell how many minutes had elapsed in the meanwhile. He had gone not less than two hundred yards in the meantime, but whether he had halted at any other place in going that distance, the witness could not know, and could not tell. The case then went to the jury without any further evidence.

The Court, Comegys, C. J., charged the jury, that there was but one question in case for them to consider and decide, and that was whether or not the prisoner shot James Brown with the felonious intent to kill and murder him, as alleged in the indictment. That he did shoot him with that intent was a material fact alleged by the State, and must be proved, as much so as any other material

fact alleged in the indictment, in order to convict him in manner and form as he stood indicted. It was early so ruled in Bill Jefferson's case, and had ever since been recognized as the law on that subject in this State. It may, however, be inferred upon the facts and circumstances attending the case, as where the act is committed intentionally with a deadly weapon, since every one is presumed to intend the natural consequences of his own willful or voluntary act. But the jury must be satisfied from the evidence before them beyond a reasonable doubt that he shot him with the intent to kill and murder him, or they should acquit him of the felonious charge contained in the indictment, and in doing that they might however convict him of the assault and battery simply.

Verdict—"Not guilty."

COURT OF OYER AND TERMINER.

THE STATE *v.* WILLIAM THOMAS.

Murder of the first and second degree and manslaughter defined.

When in a case of homicide the defense is that at the time of the act done the prisoner was under the influence of *delirium tremens*, an insane disease, destroying accountability for his act of homicide, to make such defense available he must show it by proof to the satisfaction of the jury and to their minds convincing, and unless he does the verdict cannot be in his favor. It would be for the jury to decide on all the evidence in the case whether there was in their minds sufficient proof to convince them that the horrid act, so deliberately done by the prisoner, was to be ascribed to insanity and the disease *delirium tremens*, for if it was the result of the mere phrensy of drunkenness, and not of actual insanity produced by continued dissipation, it would not excuse the crime. Insanity is not to be presumed, but must be affirmatively proved to overcome the presumption of sanity in all cases; and if the acts and conduct of the prisoner show to the minds of the jury conclusively that he had sufficient reason to contemplate the act he did and its consequences, at the time he did it, they are of more value than the opinions of witnesses, how learned and experienced soever they may be. But if upon a calm review and consideration of all the testimony, and regarding it alone, the jury have in their minds a reasonable doubt in the case, such as an honest, candid, intelligent mind may entertain, of the guilt of the prisoner, that is, of his capacity to know that it was wrong to kill his wife, he is entitled to the benefit of that doubt and should be acquitted.

New Castle County, May Term, 1877. At a Court of Oyer and Terminer held at this term, William Thomas was indicted for the murder in the first degree of Sarah E. Thomas, his wife, by cutting her throat with a razor, in the city of Wilmington on the 5th day of April preceding.

The first witness called for the State was a daughter of the prisoner, in the thirteenth year of her age, who stated that she was at her home in West Wilmington with her mother and two little sisters on Friday, the 5th day of last April, and that soon after 12 o'clock that afternoon her father left home to go to work, while her mother was lying down on the lounge and she was sweeping up stairs, and returned from his work at 5 o'clock precisely by their clock. She was then ironing, and her mother was still lying on the lounge in the room. He sat down, but did not say anything for a good while. She then asked her father what he would have for supper, and he said he did not know. She did not speak again, nor he either for five or ten minutes. She then asked him if he would not have a slice of toast with an egg on it and a cup of tea, and he said yes, and she got them for him and when they were ready he sat down at the table and ate his supper, but her mother did not eat her supper then, but remained lying on the lounge. After supper he sat down again in the room, and after sitting a short time he said he was going to bed, which was then about 8 o'clock, and arose from his seat and went up stairs. Her mother was still lying on the lounge, but in about fifteen minutes afterwards she got up and ate her supper and went to bed, and in about ten minutes after that she heard them talking up stairs in a low tone, and went to the stairs and then heard her father charge her mother with going with another man without mentioning any name, but she did not reply. She then returned to her work and went on ironing, and heard nothing else until about fifteen minutes afterwards, when she heard her father say to her mother that he wanted her to tell the truth, and heard her say she had no truth to tell. She finished ironing after 8 o'clock some time and went up stairs to bed herself with her little sisters, and saw her father and mother in bed in the back room. Her room was on the right hand side going up the stairway, and theirs was on the left, and she was just getting undressed and ready to go to bed when she

heard her father tell her mother to get out of bed, and her mother ask him what he wanted her to get out of bed for, and heard him say, because she was drunk. She then got out of bed and came into her room where she and her little sisters were in bed, and stood by the side of it for a while, and then went back to her own room, but when she went back into it and was going to bed again, her father who was still in bed, told her to go into their room, and she did so and he followed her into their room, and said to her that she had bought neckties and watch chains for another man. She denied it, but he said he knew she did, and told her to go and find them. She denied that she had ever bought anything, and he then took her by the arm and led her into their room, and she followed them, but her father shut the door behind him, and she then went back to her room and put on her dress, but heard him ask her mother if she wanted to die in the dark, and her answer that, of course, she did not want to die in the dark. There was no light in their room, but one was kept burning every night in hers. She then went and opened their door; her father was standing by the bed and her mother was lying on the floor, when he picked up the pitcher and said he would smash her brains out, but he did not strike her. Her mother said nothing. He told her (the witness) to go and get the razors, he was going to cut her throat, but she would not go. He then picked her up in his arms and partly carried and partly dragged her down the stairs into the back room (she and her sister Rosie following them down the stairs) and laid her down on the lounge, and then went to the cupboard in which he kept his razors, when she in her fright ran over as fast as she could with her sister to Mr. Hawk's across the street and gave the alarm. She returned alone in about five or ten minutes and went up stairs into her room where she found her little sister Sally, not four years old, standing by the side of the bed, her mother lying on the floor by the door, (but she was so frightened she hardly looked at her though she saw blood on the floor,) and her

father standing in their room about five feet from the door with a razor in his hand and his throat cut, and with what looked like blood on the razor, and said to him, "Father, what have you done?" He said, "Never mind Nellie dear, I've killed your mother, and cut my own throat, for I would have been hung any how." She did not remain in the room, but then went back to Mr. Hawk's. She went back to the house again after that with young Mr. Hawk to lock it up, but saw nothing of her father then. She never heard him threaten to take her mother's life before that night; and he did not seem to have been drinking either when he left home to go to work, or when he came back again that afternoon. On cross-examination she added his eyes did not look right, they looked wild, he had been sick the day before, and she noticed trembling in his hands when he left that afternoon, and that his eyes and hands were the same, and only worse when he returned that afternoon, and he was then shaking his head and talking to himself; and she had to speak to him two or three times before he would answer her. Her mother was intoxicated, and had been lying on the lounge all day, and she noticed she was very much so and staggered when she went to bed; and her father while in bed was rolling about and talking to himself. She was not frightened by the appearance of her father, because he was always very kind to her and her sisters, and to her mother when he was sober; and it was only when he got on a spree that he was cross to her; and he had been taking a good many during the past winter. Her mother was not held down on the floor by her father up stairs at the time first referred to by her, and when he picked her up and carried her down stairs she made no resistance or outcry. Her mother had been from home from the Saturday before, until Wednesday when she came home and got ten tollars which she had hid away under the carpet, and a dress and her ear-rings and went away again, but came home without them on the day before that day, and had been intoxicated ever since she came back. Her father was sick on Thursday, the day before her mother was killed

and Doctor West attended him, and he had been drinking very hard for a week before that day.

The next witness was the police officer who arrested him, and who stated that he went to the house of the prisoner about half past 9 o'clock that night, and the first thing he particularly observed there was blood on the stairs, and the next was the prisoner sitting on a chair in the back room up stairs with his head inclined back against the door, and the first thing he said to him was, "what in the world have you done?" And his answer was, "I have cut my wife's throat, and my own." His wife was lying on the floor in the front room partly in his view, and one of the razors was lying on the floor near her. He arrested him and took him in a wagon to the hall; he seemed to be drunk and was cursing and swearing and talking to himself all the way there, and he then thought and said that he was either drunk, or had been drinking for some time and was crazy from the effects of it. The counsel for the prisoner having here stated that he did not deny, but admitted the killing, the Attorney General rested the case there.

Gray, for the prisoner, then opened the defense and stated that the prisoner and his wife were originally from Cardiff in Wales, but had been living for the last nine years in Wilmington, during which time he had been in the employ of the firm of Harlan & Hollingsworth in that city as a black smith, or worker in iron, of superior skill and efficiency in his trade and in the position which he held in their large establishment; and then after briefly adverting to the domestic trouble which had recently driven him to an extreme indulgence in the use of intoxicating liquor, and to the facts which he expected to prove, that the ground of defense would be that it was one of those secondary effects of what is denominated *delirium tremens*, and which was well known and recognized to be a species of temporary insanity so long as it continues, that would unquestionably exonerate the unfor-

fortunate subject and victim of it from all liability in a court of law and justice, for any act committed by him however shocking or deplorable it might be, or however felonious or atrocious it would be, if committed by a sane or rational man.

Thomas Johnson, the foreman in the Harlan & Hollingsworth establishment, was the first witness examined by him, and stated that he had known the prisoner as one of his workman as foreman in the establishment about five years; that he was one of their best workmen, and he never saw him drunk, but he was some times away, and he had seen him when he thought he had been drinking; he had been away until that Friday afternoon, and when he first saw him there that afternoon he was struck by his appearance, it was strange and wild and his nerves seemed tremulous, and the second time he saw him that afternoon, he came to the conclusion that he was not in his right mind.

John Edwards, a workman in the establishment, was next examined as a witness, and stated that when the prisoner came to work that afternoon, he had a very different look from any thing he had ever seen before, and he thought his mind was affected from his strange and wild appearance. He had seen him intoxicated, but he was not intoxicated then. It was something more and worse than intoxication that affected him then.

William Boney, another workman in the establishment was then examined as a witness, and stated that he was the prisoner's helper in it for three weeks, and that afternoon his complexion was very white, and his look was wild, and he said he felt horrible, and while the iron would be heating instead of watching it closely as was and had always before been his custom, he would be looking out of the windows and talking to himself; and he thought then his mind was not right, owing to his having been on a spree for several days before and the effects of liquor,

but he was not then drunk or intoxicated. And another helper at riveting on that occasion corroborated the foregoing statement, adding that he was not like he had ever seemed before; he was wild-looking, and would every now and then be looking quickly and strangely, looking back over his shoulder, and out of the windows, as well as talking to himself, and he then thought he was not in his right mind, but he was not drunk or intoxicated.

Another witness, Michael Connell, was examined and stated that he had known the prisoner five years, and in the afternoon of that day between four and five o'clock he saw him walking very rapidly and swinging his arms violently on Front street, in his shirt sleeves with his working apron rolled up in front of him, and his manner as well as dress was so strange for him on the street that he attracted his particular attention, and he at once thought there was something wrong in the mind of the man. He had seen him under the influence of liquor, but he was not then drunk or intoxicated; he was, however, very much and very strangely and wildly excited both in his appearance and manner on that occasion. While other witnesses who were also at work that afternoon in the same establishment, stated that he strangely and abruptly left it between those hours with his working apron and old hat on and his sleeves rolled up, leaving his good coat, vest and hat behind where they usually hung when he was at work.

Dr. S. L. West was also examined as a witness and stated that he had known the prisoner between three and four years and had been his physician twice in that time, the last time he was to see him was on Thursday preceding the day on which his wife was killed. He had been drinking hard and was anxious to get off his spree and get back to his work, and he considered from the symptoms that he was affected with what is termed *delirium tremens*, and was treating him accordingly, but was sur-

prised to find him much better the next morning. He thought he would be in a fit condition to go back to his work by the afternoon of that day, and administered a tonic and then told him, if he thought himself strong enough he could go to work that afternoon, as he informed him that he had been sent for and was wanted at the establishment, and enquired of him if he could go to work by that time. *Delirium tremens* is considered by the medical faculty to be a species of mental unsoundness or insanity, superinduced by the intemperate use of intoxicating liquor.

Dr. Howard M. Ogle testified that he saw the prisoner that night after he had been arrested and taken to the hall, and also on the next day, and again on the day following that, in the jail at New Castle, and that he was then under great cerebral excitement; and several other physicians who had heard the testimony of the preceding witnesses, were examined and expressed the opinion that the prisoner at the time of committing the homicide was suffering under an attack of *delirium tremens*, and stated that it is a species of insanity, and that the attacks of it are almost invariably more violent in the evening than during the day.

The police officer who arrested the prisoner was then recalled by the Attorney General and stated that when he was about to arrest him at his residence, he told him there was money in the house, and when he asked him where it was, he said there was twenty-five dollars in his pantaloons' pocket in another room to which he directed him, and when he went there he found twenty-four dollars and some cents in one of the pockets of them.

H. Pennington, Deputy Attorney General. The law would presume that the prisoner was sane and capable of distinguishing between right and wrong with reference to the act, and to know that it was wrong when he commit-

ted it, and that he was criminally responsible for it, until it was otherwise proved from the evidence in the case. But the first words he uttered to any one after he had committed it was a calm and candid confession that he knew it was a crime, and a crime punishable with death, for that was the import of his declaration to his daughter Nellie made in ten or fifteen minutes afterwards, when he said to her that he had killed her mother, and cut his own throat, for he would have been hung anyhow; while the last testimony produced on the part of the State showed that he was equally as calm, clear and rational in his mind and consciousness some twenty or thirty minutes afterwards when he was about to leave his house in the custody of the officer who arrested him, and when he informed him of the twenty-five dollars they were about to leave behind them in it, and where he would find it in his pantaloons' pocket in another room. These facts were not only strong proofs of a sound mind, but of a sound memory, reason and reflection. He would not deny that *delirium tremens* was a disease produced at times by protracted and excessive indulgence in the drinking of intoxicating liquors, and that it was also considered a species of insanity, but it was both temporary and fluctuating in its character and effects, and not a permanent or continued insanity even while the disease lasts; and as that was the sole ground of defense, for the reason already stated by him, it was incumbent upon the prisoner to satisfy the jury beyond a reasonable doubt by a preponderance of evidence, at least, that he was at the time when he killed his wife, laboring under such an overwhelming attack of that disease and that species of insanity, that he was incapable of distinguishing between right and wrong with reference to the act itself he was then committing, and of knowing or comprehending that his cutting of her throat, or killing her was either wrong in itself, or a crime in law; for even a reasonable doubt entertained by the jury on that point, and as to the sufficiency of the proof of insanity to that extent, would not entitle the prisoner to a verdict of acquittal at their

hands. *State v. Dillahunt*, 3 Harr. 551. *State v. Windsor*, 5 Harr. 512. *Rex v. Offord*, 24 E. C. L. R. 508.

Gray, for the prisoner. He had already announced that the only defense in the case would be insanity. And insanity produced by the long continued use of alcoholic stimulants, known as *mania a potu or delirium tremens*, like insanity produced by any other cause, is an excuse or defense for a homicide committed under its influence. 1 *Whart. Secs.* 32, 33. *Bish. Sec.* 303. *Whart. & Stille's Med. Jur. Secs.* 202, 203, 204. *U. S. v. Drew*, 5 Mas. 28. 1 *Ld. Crim. Ca.* 131. *U. S. v. McGlue*, 1 *Curt. C. C. Rep.* 1. *State v. Dillahunt*, 3 Harr. 551. *State v. McGonigal*, 5 Harr. 510. Now, as to the burden of proof. Originally the defense of insanity was considered and regarded as analogous to a special plea in confession and avoidance of the crime charged, and that it was therefore incumbent upon the prisoner to prove and establish it to the satisfaction of the jury, and no doubt merely which they might entertain on that point could avail him, because the burden of proof was on him, and he was bound to establish his special defense to their satisfaction beyond a reasonable doubt, and if he failed to do that they were bound to find against him. But that was no longer considered a sound rule of law generally in this country, at least, and it was now held that the State is bound to prove the offense charged to the satisfaction of the jury beyond a reasonable doubt, as much so when the doubt is with reference to his criminal responsibility when the prisoner committed the act, as when it is with reference to the question whether he did or did not commit it; and therefore under the later rule, although *prima facie* the prisoner must be taken to be sane, yet any proof of his insanity at the time when he committed the act, appearing on the trial, makes it incumbent upon the State to prove his sanity to the satisfaction of the jury beyond a reasonable doubt, it being an element or ingredient to constitute his guilt of the crime, or, in other words, to constitute the crime itself in

such a case; or there must, at least, be a preponderance of proof in favor of his sanity, for in finding a verdict of guilty in such a case, the jury must necessarily find that he was sane; and therefore if upon the whole evidence the jury should have a reasonable doubt of his guilt, they must acquit. *Bish. Sec. 534. 2 Greenl. Ev. Sec. 81. Commonwealth v. McKie, 1 Ld. Crim. Ca. 299. People v. Garbutt, 17 Mich. 9. People v. McCan, 16 New York, 58. State v. Bartlett, 43 New Hamp. 224. State v. Jones, 50 New Hamp. 369. State v. Pike, 49 New Hamp. 399. State v. Crawford, 11 Kansas 32. 1 Crim. Law Rep. 760. 2 Crim. Law Rep. 638.* The presumptions in law against a prisoner are all presumptions of facts, and a species of evidence, but if other evidence rebuts them and renders the fact presumed doubtful, it is not proved, and the jury could not find the fact to be proved in such a case to their satisfaction.

Pennington, Attorney General, replied and conceded the point made and contended for on the other side as to the effect of a reasonable doubt, if the jury upon all the evidence for and against the prisoner, should conscientiously entertain such a doubt, but he denied on a review and consideration of it that there was good ground for any such doubt in the case.

The Court, Comegys, C. J., charged the jury. The prisoner at the bar, William Thomas, stands indicted of the crime of murder in the first degree, the victim of his violence being his own wife, Sarah E. Thomas; I say of his violence, because the act of killing of the wretched woman is admitted by the prisoner's counsel. Before I proceed to notice this alleged crime, the law applying to it, and the evidence by which the charge of malicious homicide is sought to be established on the one side, and is denied upon the other, I desire to say to you, that the case itself in its several aspects has been presented to you, by the learned Attorney General and his deputy, and by

the counsel for the prisoner, with a very high degree of ability, as well in the production and examination of their witnesses, as in the discussion of the questions of law upon which our opinion has been sought, and of fact where it is your province to make the ultimate verdict. And I further say to you, gentlemen, that I shall endeavor, in giving to you the judgment of the Court in this case upon the law pertaining to it, not to allow myself to be influenced, to the prejudice of the defense of the prisoner, by any words said by his counsel to the Court, or omitted to be said by him, holding it as we do not only our duty, but regarding it as a pleasure also, to say nothing to a jury at any time that we are not called upon to say by the nature of the case on trial, its claims and its defenses.

It is not to be denied, gentlemen, that a very shocking homicide was committed within the body of this county on Friday the fifth day of last month. A man killed his wife in the city of Wilmington by cutting her throat with a razor, and thereby producing, as we may conclude, instantaneous death. The prisoner at the bar was the slayer, and his wife the subject of his violence. A homicide so atrocious, shocked the sensibilities of the community of that city, and of the people throughout the entire State, for a knowledge of the act committed was borne to the remotest part of it very soon after it occurred. Upon the theory that the deed itself was done under the circumstances reported, and by a person of accountability, no crime has ever been perpetrated in Delaware at all equaling it in point of enormity. A mother, with three young female children, the eldest barely thirteen years of age, was slain, almost in their very presence, by her husband and their father. The slayer is now before you upon his trial for this act, which is alleged by the prosecuting officer of the State to be of the highest grade of homicide, murder of the first degree, and the indictment found by the grand jury so charges it in express terms. The prisoner has pleaded not guilty to this charge, and answers through his counsel that no crime whatever has been com-

mitted. You are to determine gentlemen, who is right in this matter; and in so doing you are to be governed by the law, as we shall give it to you, and by the evidence as you have received it from the mouths of the witnesses.

In order that you may discharge yourselves, gentlemen, of the very painful as well as responsible duty now devolved upon you, that of deciding a question so momentous to this prisoner, and important to the welfare of the State also, it is necessary that you shall be informed upon the subject of homicide, or manslaying. Of course you know as well as we, what homicide is; but you may not so well know that, by the law, it is divided into two branches, felonious and not felonious. It is with the former, felonious homicide that we have to do; for in this case no offense at all has been committed unless it be a felonious homicide. In this State there are three kinds of such homicide, murder in the first degree, murder in the second degree, and manslaughter.

Murder of the first degree is the intentional killing by one person of another with express malice aforethought; or in perpetrating or attempting to perpetrate any crime punishable with death. This definition is a perfectly simple one in the language employed in the books to express it, and cannot be misunderstood, except so far as the term *malice* may be misleading. It is somewhat unfortunate that it should be necessary to use such a term to express a meaning which is not to be precisely understood without explanation. This term is not restricted to spite, malevolence, or ill-will to the deceased in particular, but is understood to mean that general malignity and recklessness of the lives and persons of individuals which proceed from a heart void of a just sense of social duty and fatally bent on mischief. This state is necessary to constitute the crime of murder, and it must be shown by some express act, to reach the grade of murder of the first degree; whereas murder of the second degree, or with implied or constructive malice, is an inference of law upon the facts found by the jury. Express malice is

shown by the circumstances attending the act, such as the deliberate selection and use of a deadly weapon knowing it to be such; a preconcerted hostile meeting whether in a regular duel with seconds, or in a street fight mutually agreed on, or notified and threatened by the prisoner; privily lying in wait; a previous quarrel or grudge; the preparation of poison or other means of doing great bodily harm, or the like. In the case of implied malice, the actual intention of the prisoner becomes an important fact, for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious (not capital) or unlawful act from which the law raises the presumption of malice. The other offense of homicide is that of manslaughter; which is where the killing is felonious by our statute, but as it lacks the ingredient of malice, is of far lower grade than either of the other crimes. A familiar example of it is where a person, under great provocation and in a sudden heat of passion, unfortunately slays another, having no previous design to take his life. It is not necessary to illustrate it further, nor, as we conceive, to treat, with more remark, the crime of murder in the second degree, or with malice implied in law; for the case you have in charge is unquestionably one of murder in the first degree, or it is no crime at all. Certainly, unless it has been shown by the evidence, adduced by the prisoner's counsel, to your satisfaction, that at the time he killed his wife he was so destitute of reason as not to be able to know that he was doing a wicked act, and that such destitution is to be regarded as the effect of insanity with which he was afflicted as a disease, he is guilty of murder in the first degree; because there is not only no provocation and sudden heat shown that can reduce the offense to manslaughter; but the expressed purpose to kill, as proved by the first witness, the unfortunate child of such wretched parents, together with the selection of the sharpest of all instruments, a razor, to do it with, a deadly weapon of the most fearful

kind, raises the offense to that of murder of the highest grade. In fact, the killing is admitted by the prisoner's counsel, as well as the means used to do it; but he contends that, nevertheless, no crime, in legal contemplation, was perpetrated, because the prisoner was insane and therefore incapable of the exercise of any reason, or will in relation to the offense imputed to him; in other words, when the act was done, the prisoner was a victim of the malady of *delirium tremens*, or insanity from the excessive use of intoxicating liquor.

If it be true, gentlemen, that when the fatal cut was given by the prisoner, he was so insane as to be incapable of realizing the fact that he was doing a harmful and wicked act, and that from disease; then, instead of being an object of horror and detestation as a wife-murderer, he is entitled to our tenderest commiseration and pity, as one stricken by God with insanity. It would be inhuman, to a degree that I feel sure will never be witnessed in this State, to hold such an unfortunate being liable for any act done by him. This proceeding would be a gross outrage upon all justice should it result otherwise than in absolute acquittal, if such a person is upon trial. But here is a dreadful homicide committed, and the law presumes in the absence of contrary proof adequate to rebut the inference, that it was done maliciously; and it also implies the requisite mental capacity on the part of the doer of it. Both these presumptions must be got rid of by the proof in the case before you can acquit the prisoner at the bar; but when you have proved before you such a state of facts as requires you to treat him as incapable, at the time, of committing crime, of knowing that it was wrong to kill his wife, you have overthrown the latter presumption; and the other, that of malice, of course falls to the ground. In this case the defense set up is, that at the time of the act done, the prisoner was under the influence of *delirium tremens*, an insane disease, destroying accountability for his act of homicide; but to make such defense available he must show it by proof to

your satisfaction; and there is no presumption of its existence from any antecedent attack or fits from which he may have recovered. Has the prisoner's counsel shown such a condition of his client by proof to your minds convincing? That is a question of the most vital importance to him; for unless he has, your verdict cannot be given to him. Let me place the evidence before you as it was delivered, in order that you may, possibly, the better judge of this question.

This crime, if crime it be, was committed on the fifth of April last, not very long after nightfall. The prisoner was employed as a shipsmith in the manufactory or shipyard of the Harlan and Hollingsworth Company in the City of Wilmington, and was a skilled workman there. He appears to have been addicted to drink so far at least, as to have sprees as they are called. During the week of that Friday he had been absent from his work from Monday evening until Friday, at the time for work for the afternoon, when he returned to his post. According to the testimony of three of his associates in employment, he was then in a sad condition as is common with dissipated persons, looking, as they say, wild out of his eyes or rather eye, (for he has had the misfortune to lose the sight of one,) and his behavior at times was strange, in the manner shown you by some of them, not only during the work hours, but at their close when he left the building, which was by an unusual place of exit, and in an incomplete and unusual state of dress. They say to you, as did also Mr. Pratt, who followed them in their examinations, that in their opinion he was not in his right mind. He then reached home, where he found his miserable wife, as you are justified by the evidence in the case in supposing, in a state of intoxication. He sat down and remained silent until his little daughter asked him what he would have for his supper, which she prepared for him upon his assent. Having eaten it, he sat down for a short time, and then said he was going to bed. He went up to bed about eight o'clock she says, her mother soon after rising from

the lounge, and going to bed also. About ten minutes afterwards she states, she heard her father and mother talking in a low tone up stairs, but couldn't hear what they said. She then went to the stairs and heard her father charge her mother with going with another man. No reply was made and the witness heard nothing more until about fifteen minutes later when he said he wanted his wife to tell the truth; she replied she had no truth to tell. The witness's work (ironing) being then done she went up stairs into her own and the other children's room and partially undressed but did not get into bed. When she heard her father tell her mother to get out of bed, assigning as a reason to his wife that she was drunk. Her mother then came into their room, stood by her children's bed for a while and then went back again, her father still remaining in bed. Upon her mother offering to lie down, her father told her to go out of the room. She then returned and her father followed her and charged her with buying neckties and watch chains for another man. Upon her denying it, her father said she knew she did it, and to go and find them. Her father then took her by the arm and led her to his own room, she denying his charge. The witness followed them and shut the door of their room. She then went back and put on her dress; and then heard her father ask her mother whether she wanted to die in the dark; her mother replied that she did not. The witness then went and opened her parents' door; he was standing by the bed and her mother was lying upon the floor, and she saw him pick up a pitcher and heard him say he would smash her brains out; but he did not strike. He then however took her up and (using the child's expression) about one-half carried and dragged her down stairs, she, the witness, following. When he got down with her he laid her upon the lounge in the back-room and went to the cupboard for his razor, he having before he went down stairs ordered the witness to get it, which she refused to do. He did not tell her at the time what he wanted with it, but said afterwards that he was

going to cut her throat. When he went to the cupboard for the razor, the child was so frightened that she fled with one of her sisters to a neighbor's and gave the alarm. In about ten minutes she returned alone, went up stairs and found her younger sister beside the bed, and her mother lying on the floor of her room near the door and her father standing about five feet off with a razor in his hand. She was so frightened she did not look at her mother, but saw blood on the floor. She then states that she inquired "Father what have you done?" to which he replied "never mind Nellie dear, I have killed your mother and cut my own throat; I would have been hung anyway." The mother's throat had in fact been cut and she had died, as we may suppose, instantly; his throat was cut also but not fatally, as he no doubt intended. These are the facts of the homicide, and a more horrible detail I am sure has never been given within these walls where many a wicked crime has been proved. Upon the cross examination of the witness she stated that when her father went to work, his eye looked wild and he was trembling; that he was sick the day before and not well that morning; that when he came home he seemed worse and was shaking his head and talking to himself, and she had to speak to him two or three times before he would answer; that her mother was intoxicated and had been lying on the lounge all day and went to bed very much intoxicated. She says however she was not frightened by his appearance, because when sober he was always kind to her mother and sisters, but that of late he was a hard drinker and got on sprees.

Laying out of view the testimony of the shop witnesses, and that of Mr. Pratt, and the concluding part of that of the child, there is no proof by any witness that there was anything in the appearance or manner of the prisoner on that fatal Friday, indicating that he was not in his right mind, except that the medical gentlemen who have been examined but had no actual knowledge of his state, and spoke as experts, or persons qualified by their pro-

fession, learning and experience, have given their opinions as to his condition when the act was committed, and that he was insane at the time of the killing. It is in proof however, to you, by the testimony of one of those gentlemen, Dr. West, that he had attended him the day before for *delirium tremens*, but that when he called to see him on Friday he was so well that he disused the treatment he was giving him: that he had regained his color, his eye had recovered its accustomed naturalness, and that he was cheerful, and asked his opinion about returning to his work, which he gave approvingly: and there is not any proof from the child who saw him on his return as before spoken of, that she observed anything about him different from what was usual when he was recovering from a fit of dissipation, for she was not alarmed by his appearance, as she says. Now here is the whole case of defense, so far as any one speaks who had actual knowledge of the prisoner's condition on the day and night of the homicide, except what you have heard about his state at the Hall. But the physicians all state, that in their opinions, from the facts proved, the prisoner was a victim of insanity, produced by *delirium tremens*, at the time the deed was done.

Now, gentlemen, with this statement of the facts of this case, it is for you to decide whether there is in your minds as conscientious men, acting under the sanction of the oath you have taken, sufficient proof to convince you that this horrid act, so deliberately done by the prisoner, is to be ascribed to insanity from the disease of drink. And we say to you, and it is our duty to do it, that if it was the result of the mere phrensy of drunkenness upon that occasion, and not of actual insanity produced by continued dissipation, to use the language of Judge Wooten who delivered the opinion of the Court of General Sessions in a case called for such an expression, it will not excuse this crime; for drunkenness is no excuse for, but an aggravation of, an offense, and goes for nothing unless actual insanity is the consequence. Society would have

no protection if violence could be excused by drunkenness: but when drunkenness, or dissipation is so long continued that insanity is the result, then the insanity excuses, though it is the consequence of the party's own act.

Bearing always in mind the fact that insanity is not to be presumed, but must be affirmatively proved to overcome the legal presumption of sanity in all cases, you must give to this case your best consideration and make up such a verdict as the law and the proof demands at your hands, never losing sight of the fact of the high and momentous duty imposed upon you, and that if the acts and conduct of the prisoner show to your minds conclusively that he had sufficient reason to contemplate the act he did, and its consequences at the time he did it, they are of more value than the opinions of witnesses, how learned and experienced soever they may be. It is due to the prisoner also that we should say to you, that if upon a calm review and consideration of all the testimony, and regarding it alone, you have in your minds a reasonable doubt, a doubt such as an honest, candid, intelligent mind may entertain, in this case, of the guilt of the prisoner, that is, of his capacity to know that it was wrong to kill his wife, he is entitled to the benefit of that doubt and should be acquitted; but otherwise you should convict him. It is precisely in the highest grade of homicide that the plea of insanity is urged in the prisoner's behalf; and you should therefore weigh the testimony carefully before you allow it in the case before you. The magnitude of a crime is in itself no evidence of insanity; otherwise great offenses would for the most part, go unpunished.

Verdict—"Not guilty."

THE STATE v. GEORGE DRAPER.

Murder of the first and second degree, and voluntary manslaughter defined.

No quarrel or angry altercation between the parties, or threat or language uttered, or motion or gesture made during it by the deceased towards the prisoner, however provoking or insulting they may be, or however much they may excite his anger and heat his blood, without an assault actually made or menaced by the deceased upon his person, can constitute a sufficient provocation to reduce the homicide from murder to manslaughter, when it is committed, however suddenly, with a deadly weapon.

New Castle County, November Term, 1878. At a Court of Oyer and Terminer held at this term, George Draper, negro, was indicted and tried for the murder in the first degree, of John Wilson, negro, in Middletown, on the twenty-second day of September preceding. The prisoner was at that time the tenant of a house and lot in the place belonging to the deceased, and by the terms of the letting was bound to maintain the fences on the lot in good repair, one of which in particular he had neglected, notwithstanding the repeated requests of the deceased and his repeated promises that it should be repaired without further delay. On the day above mentioned the prisoner was chopping fire-wood in the lot near his house and near to, but within the fence referred to, when the deceased walked up the street and stopped on the side-walk outside of it near his house and spoke to the prisoner again about putting up the fence, when a quarrel at once arose between them for a few moments during which the prisoner had approached quite near to the fence on his side of it with his axe in his hand, the deceased standing on the side-walk a few steps from it and from the prisoner and facing him. During their angry wrangle over the matter the prisoner had said to the deceased that it was nothing to him whether he put the fence up, or not, to which the deceased replied that if he did not put it up he would sue him, when the prisoner responded with an oath that if he didn't go away from there

he would knock his head off, and closed his threat with the words, "you old black devil!" The deceased instantly replied to him that he was tired of being called black devil, and stepping straight up to the fence in front of him, added "you have threatened to knock my head off, now knock it off!" The prisoner immediately raised the axe and struck him a blow with it on his right shoulder partly and on his breast it came down. The deceased then turned around from him, took a few steps into the road and fell dead in it. The prisoner as soon as he saw him fall went to him without his axe and was asked by a witness of the whole occurrence who had hastened up to him at the same time, "George, why did you do that?" when he replied that he didn't know what he was about," and then said he would go to the town hall and give himself up, and at once started in that direction; and it was further proved that he soon afterwards met with a peace officer, confessed the killing and surrendered himself into his custody. The gash made with the axe was from the neck obliquely downward on the breast, about five inches in length and two in depth, and was necessarily almost instantaneously fatal. The prisoner proved that his character for peace and good order had before been good.

Robinson, Deputy Attorney General, contended that upon the facts proved it was a case of murder of the first degree.

Conrad, for the prisoner. The general criterion of murder of the first degree under the statute, was express malice aforethought which was defined in law to be where one person kills another with a sedate, deliberate mind and formed design such formed design, being evidenced by external circumstances discovering or disclosing the inward intention, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. 1 *Russ. on Crimes* 482. And that requires that the facts and circumstances proved should show a cool and deliberate intention, a sedate, deliberate mind and

formed design to kill, or to do the party some corporal or bodily harm which causes his death, in order to constitute evidence of express malice aforethought; and such facts and circumstances should appear in this case in order to convict the prisoner of murder of the first degree under the statute; while malice aforethought is implied by law from any deliberate, cruel act committed by one person against another, however sudden, which results in death, but where the suddenness of it shows that it was not done with that coolness and premeditation, or that sedate, deliberate mind and formed design to commit the act, though cruel and deliberate, as well as sudden, that act may be, which alone can be evidence of express malice aforethought; and when so committed suddenly and without any such provocation as is sufficient in law to mitigate the felonious killing and reduce it to the grade of intentional or voluntary manslaughter, it would be murder of the second degree under the statute. Now, this was a sudden killing without any premeditation or formed design to kill, in the heat of passion on both sides engendered by a brief and angry quarrel between the parties, and in the blindness as well as rashness on the part of the prisoner, he might well have supposed from the language, as well as from the angry and excited manner of the deceased when he quickly and suddenly advanced up to him at the fence, that he intended at least to strike him, and if such was his intention, then the fatal blow which he instantly struck him with the axe with which he was cutting wood at his wood-pile near at hand, and in which he was interrupted but a moment or two before by the deceased's beginning the brief quarrel with him, the killing could not amount to more than manslaughter.

Pennington, Attorney General. The *factum* of the killing of the deceased by the prisoner having been proved, the law itself presumed and implied that it was committed with malice, and that it was murder, at least, of the second degree under the statute. And such being the presump-

tion of law, it was incumbent upon the prisoner to show that the blow with such a deadly weapon was suddenly inflicted, not in a war of words or an angry quarrel merely between the parties, but suddenly in the heat of blood and a transport of passion on the part of the prisoner produced by such a reasonable provocation given by the deceased as would be sufficient in law to reduce the homicide to manslaughter, but nothing less than an assault actually committed on his person would have been sufficient for that purpose. He had, however, wholly failed to make any such proof, for no mistake of the prisoner in supposing that the deceased intended to assault him, when he simply stepped up to the fence to defy him to knock his head off, as he threatened to do, could convert that act into an assault, even if such was in fact his misapprehension at the time, or constitute it a sufficient provocation to reduce the offense of killing him under the facts and circumstances proved to the crime of manslaughter merely. For if such a cruel and willful act be not committed in the heat of blood under such an adequate provocation the law will presume in such a case that it was done deliberately, however suddenly it might have been committed, and that it was committed with implied malice, at least.

The Court, Comegys, C. J., charged the jury, that if the prisoner killed the deceased with express malice aforethought it would constitute the crime of murder of the first degree under the statute, but if he did it with implied malice, as it was termed in contradistinction to express malice, it was murder of the second degree under it, for malice was the essential ingredient and criterion of the crime of murder, and consisted of either express or implied malice. At common law it was murder of the same grade whether it was committed with express, or implied malice; but our statute had divided it into two degrees, making it murder of the first degree when committed with express malice, and murder of the second degree when

committed with implied malice. And the rule that every person is presumed to contemplate the ordinary and natural consequences of his own acts, applied even in capital cases, and in murder even of the first degree under the statute. Therefore, when one man is found to have killed another, if the circumstances attending the act of killing do not of themselves show that it was not intended, but was accidental, it is to be presumed that the death of the deceased was designed by the slayer; and the burden of proof is on him, to show that it was otherwise. And because, ordinarily, no man may lawfully kill another, and intentional homicides are in general the result of malice and evil passions, or proceed from a heart regardless of social duty and fatally bent on mischief, in every case of intentional homicide, not otherwise explained by its circumstances, it is further to be presumed that the slayer was actuated by malice; and here also the burden of proof is on him, to show that he was not, but the act was either justifiable or excusable.

As he had before remarked, the chief characteristic of the crime of murder distinguishing it from every other species of homicide, and therefore indispensably necessary to be proved, is malice prepense or aforethought. This term, however, is not restricted to spite or malevolence towards the deceased in particular, but it is understood to mean that general malignity and recklessness of the lives and personal safety of others, which proceeds, as I have before stated, from a heart void of a just sense of social duty, and fatally bent on mischief. And whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes that it was done in malice; and it behooves the prisoner to show from evidence, or by inference from the circumstances of the case that the offense is of a mitigated character, and does not amount to murder of either degree under the statute.

Express malice, the principal characteristic, as I have before said, of murder of the first degree is proved by evidence of a deliberately formed design to kill another;

and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, knowing it to be such, a preconcerted hostile meeting, whether in a regular duel with seconds, or in a street fight mutually agreed on, or notified and threatened by the prisoner, privily lying in wait, a previous quarrel or grudge, the preparation of poison, or other means of doing great bodily harm, or the like. Implied malice, the characteristic of murder of the second degree, is an inference or conclusion of law upon the facts found by the jury, and among these the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises the presumption of malice. Thus if one attempts to kill or maim A, and in the attempt, by accident kills B, who was his dearest friend, or darling child, or if one in the attempt to procure an abortion, causes the death of the mother, or if in a riot or fight one of the parties accidentally kills a third person who interfered to part the combatants and preserve the peace, the law implies malice, and the slayer is guilty of murder, but murder of the second degree now under our statute, because of being committed with implied malice.

Manslaughter differs from murder of either degree principally in this, that in the latter there is the ingredient of malice, while in the former there is none: or as Blackstone expresses it, manslaughter when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart. Manslaughter is therefore defined to be the unlawful killing of another without malice, either express or implied. And for that reason on a trial for murder, if there is no sufficient evidence of malice, either express or implied as before defined and explained, and the act of killing being proved, is not justified nor excused, the jury must return a verdict for manslaughter. It is of two kinds, voluntary and involuntary manslaughter.

ter. But there is no occasion to speak of any but the first mentioned in this case. Voluntary manslaughter is where one person kills another in the heat of blood; and this usually arises from fighting or from provocation, and in case where the parties have been fighting with each other, and one kills the other, in order to reduce the crime from murder to manslaughter, it must be shown that there was not sufficient time for the passion to subside before he did it. And though there was not time for passion to subside, yet if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder. Thus if the slayer provide himself with a deadly weapon beforehand, in anticipation of the fight, and not for mere defense of his person against a felonious assault, or if he take an undue advantage of the other in the fight, or if, though he were in the heat of passion, he should designedly select out of several weapons equally at hand, that alone which was deadly, it is murder and not manslaughter, because of the implied malice, at least, indicated in such cases. But where homicide is committed upon provocation, it must appear that the provocation was considerable, and not slight only in order to reduce the offense from murder to manslaughter; and for this purpose the proof of reproachful words how grievous soever, or of actions or gestures expressive of contempt or reproach, without an assault, actual or menaced, on the person, will not be sufficient, if a deadly weapon be used.

Such was the law in general on the subject describing the nature and characteristics, and defining the distinctions and gradations, of murder in the first and second degree and voluntary manslaughter; and it only remained for him to add with reference to that case that no quarrel between the parties, or angry altercation or dispute between them, or mere threat uttered, or language used, or motion or gesture made by the deceased towards the prisoner during their brief wrangle about putting up the fence, however insulting or provoking they might have been, and however much they might have exasperated the prisoner,

or excited his anger and passion and heated his blood, unless the deceased made or menaced an actual assault upon his person, could constitute a sufficient provocation to mitigate and reduce the killing of him with such a deadly weapon as an axe, however sudden and unpremeditated might have been the single blow inflicted with it, to the crime of manslaughter. So far as the evidence shows there was but one threat, and that a conditional one, made by the deceased, and that was, that if the prisoner did not put up the fence, he would sue him, and which, he had a legal right to do, provided the prisoner was legally bound to repair it, and which he answered with a conditional threat of a very violent and outrageous character, and with an oath that if he, the deceased, did not go away from there, he would knock his head off, having about or a little before that time and during their quarrel stepped up nearer to the fence with the axe in his right hand and further insulting the deceased at the same time by calling him a black devil; and it was that threat and that epithet which appeared to provoke the deceased to step up to him on the other side of the fence and barely within the reach of his axe, and to simply say to him as he stood before him with his hands in his pockets, he was tired of being called a black devil, and as he had threatened to knock his head off, then knock it off, when the prisoner already in a high state of anger and passionate excitement instantly raised the axe, and with a downward blow of it inflicted the fatal gash of five inches in length and two in depth on the right side of the breast of the deceased, and of which he died after turning around from him and taking a few steps into the street. And on that simple statement of the facts and circumstances of the case as detailed by the witnesses, the Court would leave it to the jury, to whom it properly and solely belonged, to decide whether there was anything in that act or motion of the deceased, or in any other act or motion of his on the occasion, so far as the evidence went, that indicated any assault, either made or menaced by him upon

the person of the prisoner. If there were, the offense amounts to voluntary manslaughter, but if not, then there was no provocation proved in the case that could reduce the homicide to the grade of manslaughter. Nor could the facts that the prisoner at once declared that he did not know what he was about when he struck the blow, and soon afterwards confessed the homicide and voluntarily surrendered himself into the custody of a peace officer, or his previous character for peace and good order, contribute in any degree to qualify the conclusion of the law in regard to the felonious act committed by him, according as it might be determined by the jury from his own confession and the evidence, or to mitigate and reduce it to the offense of manslaughter.

Verdict—Guilty of murder of the second degree.

THE STATE v. HARLEY G. BROWN.

It is murder of the first degree and punishable with death to willfully and maliciously place an obstruction on a railroad track with intent to displace or throw off any engine, tender, train or car running thereon, if displaced or thrown off, and any person is thereby killed. And the malicious intent in such a case will be presumed from the willful and malicious act of placing the obstruction on the track, as the ordinary and natural consequence of placing an obstruction on a railroad track for such a purpose, is to displace or throw from it, the engine and the whole, or some portion, of the train running against it, or over it.

By the law of this State where one person in pursuance of any deliberate purpose or plan of taking another's life, or doing him some great bodily harm, kills him, he is guilty of murder of the first degree; so if he purpose to commit an act punishable with death, and in the execution of that purpose kills another.

But where there is not evidence of any such purpose or plan, and yet a person is killed in consequence of any felonious act on the part of the accused, or an act that denotes a disregard or recklessness of the lives or persons of individuals generally, it is murder of the sec-

ond degree. And all homicides above the grade of manslaughter, and not reaching that of murder of the first degree, are murder of the second degree.

Where there is no malice or evil design, either in fact or in law, and yet death ensues from a merely unfortunate act, or from a lawful act done in an improper manner, whether by excess or culpable ignorance, the offender is guilty of manslaughter. In connection with this it is proper to say that the prisoner was unlawfully upon the track of the railroad company; he had no business there, but was a trespasser, and his act of obstruction was an aggravation of his trespass. Therefore should it turn out that the jury find themselves unable to bring him in guilty of one or the other degrees of murder, they should convict him of manslaughter.

When once insanity is established by proof, it is presumed to continue until restoration to reason has been established by evidence also; but until it is shown to exist, the law presumes every man to be sane and responsible for his acts, until the contrary appears. Insanity, to render a person irresponsible for crime, must be such as to render him incapable of distinguishing between right and wrong in reference to the act itself he is about to commit, and deprive him of the power to choose whether he will commit it or not.

In all cases of admissions or confessions the whole of what the party said at the same time, and relative to the same subject should be given in evidence; but it does not follow that all parts of the statement are to be received as equally worthy of credit; for the jury is to consider how much of the whole they deem worthy of belief, including as well the facts asserted by the party in his own favor, as those making against him.

New Castle County, November Term 1878. At a Court of Oyer and Terminer held at this term, Harley G. Brown was indicted and tried for the murder in the first degree of George Babe, in Brandywine hundred, on the 29th day of June preceding. The first count in the indictment was framed under *Section 20, Chapter 128 of the Revised Statutes, pages 775, 776*, which among other things provides that if any person shall willfully and maliciously place any log, stone, bar, or obstruction on the road-bed or track of any railroad within this State, with intent to displace, or throw off, injure or destroy any engine, tender, train or car running or being thereon, and any engine, tender, train or car shall be thrown from the track, and

any person shall be killed by reason of such obstruction, injury or act, the person so offending shall be deemed guilty of murder of the first degree and of felony, and shall suffer death. The indictment alleged that the prisoner on the day mentioned and in the hundred mentioned, willfully and maliciously placed a cross-tie or sleeper on and across the road-bed and track of the Philadelphia, Wilmington and Baltimore Railroad Company, with the felonious intent to throw off an engine, tender and train of cars then running thereon, and thereby threw the same off the railroad, and by reason of such obstruction and the throwing off the said engine, tender and train of cars, the deceased was killed. There were several additional counts in the indictment for murder of the first degree drawn under the general statute.

The prisoner was at once suspected, and on being arrested for the act of placing the obstruction on the railroad, voluntarily confessed it, first to a detective in the employment of the railroad company, and afterwards before the jury in the coroner's inquest held over the dead body of the deceased, and the dead bodies of three other persons, and all of whom were instantly killed in the catastrophe which speedily followed it; and on both occasions made a voluntary statement of the way in which he placed the obstruction on the track, and his motive for doing it. It was placed on the track of the railroad a short distance below the station named Claymont, and the train thrown off by it was called the fast through train from New York to Washington, and had only been running about one year at that time, consisting of a locomotive, engine and tender, two express cars, a postal car, a baggage car, two passenger cars and two sleeping cars, and containing about seventy passengers, which left Philadelphia for Baltimore at twenty minutes before ten o'clock on the night of the 29th of June preceding, being ten minutes behind its usual time of departure, and was running at the rate of about fifty miles an hour, (the usual speed of it when on time being

forty miles an hour,) when it reached the obstruction and was thrown from the track by it about thirty minutes afterwards. The deceased was the locomotive engineer of it and was then in the cab of the engine, and was killed in the almost total wreck and destruction of the cab, and whose dead body was soon afterwards found under the fragments of it in a ditch along side of the railroad into which it had been hurled by the immediate crush between the tender and the engine. The conductor, as soon as he could, got out of the train and after starting a messenger up the road to stop any train coming from that direction and also a messenger down the road for the like purpose, proceeded up the road towards Claymont station, and about a hundred and fifty yards from the train, and not over fifteen from where the obstruction had been placed, he met the prisoner who touched him on the shoulder and said to him that he did all he could to stop it, and when asked by him where he was, and if he was on the train, he said no, that he was on the ground, and when asked what he was doing there, and what he wanted to stop the train for, he said there was a cross-tie on the track, and when asked why he did not take it out replied that he tried, but it was jammed in so tight that he could not do it, and that he then heard the whistle and the train coming and stood on the track until he had barely time to get out of the way of it, and did all he could by calling aloud and waving his handkerchief to the men on the engine as it came, to stop it, but it was going so fast and with a long blow from the whistle that they could not hear him; he was then asked if he was going to stay there, or where he was going, and said he was going to stay around there, and that his name was Brown, and at any time he could be found about Wilmington.

The prisoner had been apprehended that night on suspicion for the offense, and committed to the cells of the city hall in Wilmington, and on the next day, after being apprised by the officer before referred to that he was satisfied that he was in a terrible position and his life was in

danger, and requested and admonished to tell him the truth, he burst into tears and said that he did it, and when asked by him what could have induced him to commit such an act, stated that he was out of employment and had a family and wanted a position on the road; that he did not know there was such a train as that fast through train on the road at that hour, but he knew that there was an accommodation train from Philadelphia due there soon after that time, and that it would stop for a few minutes at Claymont station, and his intention and expectation was to be there before it arrived, and inform the conductor of that train of the obstruction, as one which he had just discovered on the road, and could not remove, but had come back to the station in time to inform him of it, and by that means to secure the approbation and favor of the company, and obtain a position on the road; but the first intimation he had of the approaching express or fast through train was the blowing of the whistle of it as it passed Claymont station, and he became excited and ran to stop it as it came towards him, but the engineer did not see or notice him, and he then soon heard the crash of it. He was then asked if he would make that statement before the jury at the coroner's inquest, and replied that he would, and that he would do every thing in his power to make reparation for the wrong he had done. He afterwards was taken with the coroner and the jury of inquest from Wilmington in a car up the railroad to view the place, and voluntarily showed them how he placed the cross-tie as an obstruction on the track, but then stated that when he heard the whistle of the train blow, he suddenly seized it and pulled it out of its place, and threw it aside, as he then thought, clear of the track, but he was terribly excited and as soon as he got it out he started in a run to signal the train which he heard coming.

It further appeared from the evidence on behalf of the prisoner that he came from Maine into this State in 1864, and soon after was employed as a brakesman on the Dela-

ware Railroad, by the Philadelphia, Wilmington and Baltimore Company as the lessees of it until 1869, during which time he had been promoted with increased pay, but not being content with his position and compensation, he voluntarily resigned it and returned to the State of Maine, having in the meantime married and settled in Wilmington. He remained in that State but three or four years, when he returned to Wilmington and again sought employment in the service of the railroad company without success, and having been without any employment for a considerable period immediately preceding this occurrence, he was very much depressed and distressed over the condition in which he found himself, and so much changed in his character and deportment, as to lead a large number of his acquaintances to think that he was not in his right mind before and at the time when the act was committed, and who expressed that opinion as witnesses in the trial. It was also proved that whilst he was employed on the Delaware railroad, he sustained a severe and critical injury in 1868 which affected his brain for the time being, and from the effects of which he did not sufficiently recover to resume his place on it under six weeks, and afterwards in 1873, that he suffered a sunstroke on the line of it in transferring baggage during a very warm day, which came very near proving fatal to him at the time, and again in January 1877 after his return to Maine he was prostrated and rendered insensible for a time and unfit for work for several days afterwards, by a falling limb two inches in diameter striking him on the head while he was falling pine trees in a tract of land owned by him and a brother of his living in that State; and finally by numerous other witnesses who had known him well for several years, that he had not only been a man of good and peaceable character, but kind and gentle disposition.

Among many other witnesses called to testify to his mental condition, were several of the jurors who served on the inquest in the case, and when the first one of them

sworn was asked what were the actions, manner and appearance of the prisoner, and what impression they had made upon him as to the soundness or unsoundness of his mind on the occasion of the inquest, the question was objected to because it related to the state and condition of his mind subsequent to the commission of the act.

Lore, for the prisoner. The state and condition of the mind of a party is proved like other facts, to the jury; and evidence of the state of his mind, both before and after the act done, is admissible. 2 *Greenl. Ev. Sec.* 371.

The Court differed, the Chief Justice and Judge Wootten holding the objection to be a good one, and Judges Houston and Wales that the evidence was admissible; the objection failed, and the witness was allowed to answer the question propounded to him.

Several of them then testified after stating his actions and conduct on that occasion, that they thought him to be of weak and unsound mind.

Robinson, Deputy Attorney General, contended that if the jury were satisfied from the evidence that the prisoner willfully and maliciously placed the obstruction on the railroad with the intent to displace or throw off any engine, tender, train or car whatever running thereon, he was under the first count in the indictment and the special provisions of the statute under which it was drawn, *Revised Statutes, Chap. 128, Sec. 20, pp. 775, 776*, guilty of murder of the first degree, because it so expressly declares, whether he intended anything more than that, or not, and also whether he intended to throw off any other train than the one which was thrown off by it, inasmuch as it was in proof and not denied, that the engine and cab attached to it and several of the cars of the Southern Express Train, as it was called by the railroad company,

were thrown off the track, and the deceased, George Babe, the locomotive engineer, then on the engine and in the cab of it, was instantly killed, by reason of the obstruction so placed upon it. And if the jury were satisfied that he willfully and maliciously placed it on the track with that intent, then he could be guilty of no other or minor felony or offense than murder of the first degree under the special provision of the statute referred to, or the first count in the indictment which was drawn under it. Because the Legislature specially intended to make such an act when attended with the loss of life by reason of it, penal in the highest degree, independent of any actual intention to kill or harm any body by it, in consequence of the terrible danger of wholesale slaughter to which such acts necessarily expose all persons who now travel in such large numbers on our railroads. And at common law before it was modified by our general statute on the subject, it would have been murder, and punishable with death. 1 *Bish. Sec.* 73. 3 *Greenl. Ev. Sec.* 130. But there were several additional counts in the indictment drawn under the general statute in regard to the crime of murder of the first and second degree and manslaughter, under which he might be convicted of one or the other of the two minor felonies, if the jury should be satisfied from the evidence that he did not commit the particular offense specially provided for in the statute first referred to, that is to say, that he did not willfully and maliciously place the obstruction on the track of the railroad with the intent to displace or throw any engine, tender, train or car from it, but with the intent as stated by him in his two contradictory confessions, in the first of which he stated that he found the obstruction there and tried with all his might to remove it, but could not do it, and in the second that he had placed it there, but when he was surprised by hearing the whistle of an approaching train, he seized hold of one end of it and pulled it out and threw it he thought, clear of the track, but he was terribly excited, and might have failed to do so. But as it was

an unlawful and criminal act for him to place it there, even for the purpose stated by him, and it resulted in throwing the engine and several of the cars in the train off the track, and in killing the deceased, it would constitute the crime of murder with implied malice, at least, and of the second degree under the general statute; but nothing less than that. On the defense of insanity he cited *Windsor's Case*, 5 *Harr.* 512.

Lore, for the prisoner, contended that the intent alleged in the first count of the indictment, being a material fact required to be alleged by the express words of the statute under which it was drawn, must be affirmatively proved by the State to the satisfaction of the jury, to convict the prisoner of the crime of murder of the first degree under it. 2 *Arch.* 520. *Bill Jefferson's Case*, 3 *Harr.* 571. Secondly, that the confession of the prisoner must be taken, considered and credited *in toto* by the jury, if any part of it is, provided it has not been impeached or contradicted by evidence on the other side. 1 *Greenl. Ev. Sec.* 218. Thirdly, that a reasonable doubt which the jury may have as to any material fact alleged in the indictment, and which, of course, the State was bound to prove affirmatively to their satisfaction, must inure to the benefit of the prisoner. Fourthly, that in the first, second, third and fifth counts of the indictment, it was alleged that the prisoner by means of the said obstruction so placed as aforesaid, and the velocity of the said engine, tender, train and cars running on said track as aforesaid, threw the said engine off, &c., which was an essentially faulty averment as to a material fact alleged in them. 1 *Arch.* 851. And fifthly, that in the fourth count it was alleged without stating in it the placing of any obstruction on the track, that it was unlawfully and maliciously, instead of willfully and maliciously, done in the words of the statute. 1 *Arch.* 85, 92.

Pennington, Attorney General, in reply as to the proof of the intent alleged with which the obstruction was placed

on the track by the prisoner, admitted that it was a material allegation to be proved as a fact in the case; but the mode in which it was to be proved in most cases in which a question of intention as a matter of fact must be proved affirmatively as alleged by the State, was recognized in the leading case cited on the other side, of the *State v. Bill Jefferson*, 3 Harr. 571; and that ruled that it may be inferred from the means used by the prisoner in performing his purposes, as for instance, from the deadly nature of the weapon or instrument used by him when the killing is direct, for every sane person is presumed in law to intend that which is the ordinary and natural consequence of his own intentional act. *Beaver's Case*, 5 Harr. 508. 3 Greenl. Ev. Sec. 13, 14. And the prisoner as a railroad man, well knew that the ordinary and natural consequence of placing such an obstruction on the track would be to throw any train off which ran against it. As to the free and voluntary confessions or statements made by the prisoner, the rule of law was now equally well settled, and that is, that the whole of them should go in evidence to the jury, and he had done that in this case. But although the whole of them was to be put in evidence and taken into consideration by the jury, they were not bound to take what he had said in his own favor to be true, because it had been put in evidence by the State, but were to weigh it with all the facts and circumstances proved in the case, and determine whether they believe the whole of it or not. They might believe that part which charges the prisoner, and disbelieve and reject that which was in his favor, if they saw sufficient grounds on the consideration of all the evidence in the case for so doing. 2 Russ. on Crimes, 869.

The Court, Comegys, C. J., charged the jury. Gentlemen of the Jury: The prisoner at the bar stands indicted of the crime of murder of the first degree; and it devolves upon you to say, by your verdict, whether he is guilty in manner and form as he stands indicted. If you shall de-

termine that he is not so guilty, you are to consider whether he is guilty of murder in the second degree. Should you not believe from the evidence that he is guilty of either degree of murder, you are to enquire whether he is guilty of manslaughter only. We feel warranted in saying to you, from the undisputed proof made in this case, that the prisoner at the bar stands guilty of one or the other of these crimes; unless he has shown by proof that at the time of the offense committed, he was not responsible for his conduct.

On the 29th day of June last a terrible disaster occurred in this county, resulting in the death of four human beings, from what is called, significantly, the wrecking of a train on a railroad. On that day, a short time after ten o'clock on the night of that day, a passenger express train of the Philadelphia, Wilmington and Baltimore railroad Company, whilst it was pursuing its lawful progress along the line of the Company's road, a short distance below Claymont in Brandywine hundred, was suddenly arrested or stopped by coming in collision with an obstruction, being a log, or cross-tie as it is commonly called, placed upon the track by the prisoner at the bar (as was confessed by him) and two of the valuable servants of the corporation, George Babe, and his son, George Babe, Jr., then upon the train in the course of their employment as engineers, and two other persons, also upon the train, were killed in consequence of such collision. There is no question about the collision, or the injury resulting, nor that Harley G. Brown, the prisoner at the bar, caused both. Of what offense then, in legal consideration, is he guilty? For as there is no pretense that he had any right to place the obstruction upon the track, nor that such obstruction was not the cause of the disaster, we repeat that the prisoner before you is unquestionably guilty of one or the other of the great crimes I have mentioned, and of which of them it is your province to say, as triers of that question, after we shall have given you the law applicable to all cases of homicide, or manslaughter, unless you shall find him so

destitute of reason, or so insane as to be irresponsible for his acts. We should not be unwilling to say to you, if we could, notwithstanding the fact that the two inoffensive and valuable citizens, and also faithful servants in their calling (to say nothing of the two other persons above referred to) lost their lives by this dreadful occurrence, that the prisoner is, in our opinion, not guilty of either of these offenses and instruct you to acquit him of all crime; but this we cannot do. Unless it has been shown to you that the party charged is not, on any ground, a person responsible for his acts and their consequences, we and you must hold him liable for them. That you may decide which of the crimes mentioned the prisoner committed, if either, we proceed to define them, with appropriate examples. But first as to the homicide generally.

All homicides, or killing of one man by another, are criminal or not. Those which are criminal are characterized as murders, or as manslaughter. Those not criminal are such as the law justifies, or excuses; but with them we have nothing to do in this case. There are three classes of criminal homicides, murder of the first degree, murder of the second degree and manslaughter. They are all felonious homicides also; as distinguished from justifiable and excusable homicides, which are not felonious. Both the classes of murder are distinguishable from manslaughter in this, that malice is an ingredient, or feature, of them; whereas it is entirely wanting in manslaughter.

Murder of the first degree is, by the statute law of this State, in effect, where one rational being kills another person with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death. Any killing with malice implied in law, is murder of the second degree.

Express malice aforethought is when one person kills another with a sedate, deliberate mind and formed design; such formed design being evidenced by external (or outward) circumstances, discovering the inward intention;

as, lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party bodily harm; the deliberate selection and use of a deadly weapon, knowing it to be such; a preconcerted, hostile meeting, whether in a regular duel with seconds, or a street fight mutually agreed on, or notified and threatened by the prisoner, &c.

Implied malice, or malice in a legal sense, is where any deliberate, cruel act is committed by one person against another, however sudden. Thus, where one person kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon slight or no apparent cause. So if a man willfully poisons another in such a deliberate act the law presumes malice, though no particular enmity can be proved. And where one is killed in consequence of such a willful act as shows the person by whom it is committed, to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. Malice is an inference, or conclusion of law upon the facts proved to the jury; and, among these, the actual intention of the prisoner becomes an important fact; for though he may not have intended to take away life, or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, from which the law raises the presumption of malice. Thus if one attempts to kill or maim A, and in the attempt by accident kill B who was his dearest friend or darling child; or if one, in the attempt to procure an abortion, cause the death of the mother; or if, in a riot, or fight, one of the parties accidentally kill a third person who interfered to part the combatants and keep the peace, the law implies malice, and the slayer is held guilty of murder. And though other agents intervene between the original felonious act and its consummation, as if A gave poisoned food to B intending that he should eat it and die, and B, ignorant of the poison, and against the entreaty of A give it to a child who dies thereby, or it is voluntarily tasted by

an innocent third person by way of convincing others of his belief that it is not poisoned (as in the case of the apothecary into whose medicine prepared by him for a sick person another had purposely mingled poison) the law still implies malice, and the slayer is held guilty of murder. Malice may also be proved by evidence of gross recklessness of human life, whether it be in wanton sport, such as purposely and without intent to do hurt, riding a vicious horse into a crowd of people, whereby death ensues, or by casting stones or other heavy bodies, likely to create danger, over a wall, or from a building with intent to hurt the passers by, one of whom is killed; or where in any other manner the life of another is cruelly and grossly endangered, whether by actual violence, or by inhuman privation or exposure, and death is caused thereby. And whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes that it was done with malice (that is with an evil purpose or design) and it behooves the party charged to show by evidence, or inference, from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder.

Now, applying the law, as thus delivered to you, to the act of the prisoner at the bar, his deliberate act of placing the obstruction upon the railroad track, from which, according to the testimony of the witnesses for the State, death, or great bodily harm to some of those upon the train was likely to ensue, and which consequence the prisoner, as a former servant of the company must in all reason to be taken to be aware of, unless you are convinced that his motive for placing the obstruction was what he declared it to be at the time of his acknowledgment that he was the actor in this dreadful and most disastrous tragedy, he is certainly guilty of one or the other of the degrees of murder, as we have defined them to you. In addition, let me say to you, and enjoin you to bear in mind, in your consideration of this case, that all homicides not justifiable or excusable (and the one you are consid-

ering is neither) are, in point of law, malicious; and also that every sane man is conclusively presumed in law to contemplate, that is, intend or design, the natural and probably consequences of his own acts. Harley G. Brown, then, if you disbelieve his statement of purpose, certainly designed to kill his victim by the obstruction to produce the collision, which would be express malice aforethought, and murder of the first degree, or he had a general malignity or design of mischief and recklessness of consequences to the lives and persons of individuals, under the circumstances of imperilment shown by this case, that would bring him within the description of those who are enemies of all mankind, persons regardless of social duty and fatally bent on mischief and therefore guilty of implied malice, or of the crime of murder of the second degree. It is for you, gentlemen, to say of which of these crimes, if of either, you think the prisoner to be guilty. If, however, you feel constrained, after all that has been said of the law, to believe the statement the prisoner made of his motive, and thus reach the conclusion that there was no premeditated wickedness in his act, you may find him guilty of manslaughter only; and we proceed to define that offense to you.

Manslaughter is the unlawful killing of another, without malice either express or implied or without premeditation. This is its general definition. It is also manslaughter, where one in doing an unlawful act, not felonious nor tending to great bodily harm, undesignedly kills another; or in doing a lawful act without caution, or requisite skill. Thus, if a person upon a sudden heat of passion caused by great provocation kills another, the law, if there be no circumstances showing malice, adjudges the offense to be merely manslaughter. So, if one shooting at another's poultry wantonly, and without intent to steal them, accidentally kills a man, it is but manslaughter; so, if he throws a stone at another's horse and accidentally kills a man; so, if one playing a merry, but mischievous prank, cause the death of another where no serious hurt was in-

tended, as by tilting up a cart, or the like, it is manslaughter. But if the sport intended was dangerous, and likely in itself to produce great bodily harm, or to cause a breach of the peace, these circumstances might show malice, and fix upon the party the guilt of murder. These are instances of manslaughter where the act of the party is an unlawful one. But though the act be in itself lawful, yet if done in an improper manner, whether it be by excess, or culpable ignorance, or want of due caution, and death ensues, it will be manslaughter. So it will be manslaughter if a person is killed by ignorance, gross negligence or culpable inattention, on the part of one assuming to be his physician or surgeon; or, by the negligent driving of a cart or carriage, or the like, ill management of a boat, or by gross carelessness in casting down rubbish from a scaffold, or the like. And, generally, it may be laid down that where one, by his negligence, has contributed to the death of another, he is responsible. The caution the law requires is not the utmost that can be used, but such as is used in like cases, and has been found by long experience to answer the end. You will observe therefore, gentlemen, that where death ensues from an act although not of evil or wicked purpose but barely unlawful, it is manslaughter in him who perpetrates it, and would be murder if occasioned by such purpose, which is malice.

We have given you, gentlemen, the law of this State, taken from the books of authority, on the subject of the two different kinds of murder, and manslaughter; and also examples to guide you in your duty of making up a verdict upon the facts in evidence before you; but that there may be no want of knowledge, or misapprehension on your part, we repeat:

1—That where one, in pursuance of any deliberate purpose, or plan of taking another's life, or doing him some great bodily harm, kills him, he is guilty of murder in the first degree; so, if he purpose to commit an act punishable with death, and in the execution of such purpose he kills another.

2—Where there is not the evidence of any such purpose or plan, and yet a person is killed in consequence of a felonious act on the part of the accused, or of an act that denotes a disregard, or recklessness of the lives and persons of individuals generally, it is murder in the second degree. And all homicides above the grade of manslaughter, and not reaching that of murder of the first degree are murder of the second degree.

3—Where there is no malice, or evil design, either in fact or in law, and yet death ensues from a merely unfortunate act, or from a lawful act done in an improper manner whether by excess or culpable ignorance, the offender is guilty of manslaughter.

In connection with this it is proper to say that the prisoner at the bar was unlawfully upon the track of the railroad company; he had no business there, but was a trespasser, and his act of obstruction was an aggravation of his trespass. Therefore, should it turn out that you find yourselves unable to bring him in guilty of one or the other degrees of murder, you should convict him of manslaughter.

Whether the crime of the prisoner at the bar is reducible to the grade of manslaughter depends entirely upon your belief of his motive, as he gave it, for placing the log, or tie upon the track of the railroad. Of that motive you have only his own statement to rebut the legal and rational presumption that by that act he intended the consequences, whatever they might be that should result. You may, if you feel that you are constrained to do so, believe his statement and acquit him of malicious homicide, and find him guilty of manslaughter. But you are not bound to believe that statement, though you must consider it along with what he said against himself. In all cases of admission the whole of what the party said at the same time and relative to the same subject should be given in evidence; but it does not follow that all parts of the statement are to be received as equally worthy of credit; for the jury is to consider how much of the whole statement

they deem worthy of belief, including as well the facts asserted by the party in his own favor as those making against him.

But in this case the learned counsel for the prisoner at the bar in his well-made and able defense of his client, alleges and insists before you and this Court, that, as well before as after, at the time when the act of the prisoner, so terrible and destructive of human life in its consequences was committed or done, he was insane, or had not sufficient mind or reason to distinguish between right and wrong. This is the nature of his plea for the prisoner—that he was at the time when George Babe was slain and the preparation for the catastrophe near Claymont was made, a person not only of unsound mind, but that such unsoundness was of that extent, or completeness that it made him, as to the act committed, an unaccountable being. If this be true in point of fact, and you are the sole judges of that, then you should render a verdict of not guilty in this case. It would be an ineffaceable stain upon the reputation this State is entitled to for the tender regard her laws have of human life, and a lasting reproach to you as jurors, if an irresponsible being should be punished for that he did not and could not know was a crime at all. In all jurisdictions everywhere and among all peoples, civilized or savage, a defect of reason that renders one unaccountable for his acts is viewed with commiseration, and the subject of it shielded from the least reproach even. It is one of those visitations of the Creator which all humanity respects, and which confers immunity from punishment upon him who is so unfortunate as to be the victim of it, if I may use an expression of seeming irreverence. And the law so well shields or guards against punishment for an act committed under its influence, that when once insanity is established by proof, it is presumed to continue until restoration to reason has been established by evidence also. But until it is shown to exist, another rule of law of equal force prevails, which is this; that every man is presumed to be sane, that is, responsible for his

acts, until the contrary be shown by him on his behalf. These are maxims of the law and by keeping them in your minds you will be greatly aided in finding your verdict upon this indictment, which charges the prisoner with the murder of George Babe in a variety of forms of statement, though all substantially the same.

Every man, therefore, is treated in law as sane until the contrary appears; and Harley G. Brown was a sane man in the eyes of the law, and you are bound by your oaths so to regard him, unless he has shown to you by proof that at the time he placed the fatal cross-tie on the track of the Philadelphia, Wilmington & Baltimore railroad, he had not sufficient mind or reason to understand that he was doing a wrongful act. That you may be the better enabled to consider this subject satisfactorily, we proceed to give you to understand what insanity or irresponsibility for crime is. Insanity is inability to distinguish between right and wrong in reference to the act itself, and the want of power in the actor to choose whether he will do it or not. Again it is a state of mind in which a person is incapable of the perception or consciousness of right and wrong as applied to the act he is about to commit, and has not the ability, through want of the consciousness, to choose by an effort of the will whether he will do the deed or not. These definitions or descriptions of insanity were made by this Court long since, and have ever been approved for their comprehensiveness. They mean that one so destitute of reason as not to know at the time he does an act that he is doing wrong, is not responsible for such act.

Now, gentlemen, that we have given you to understand the state of weakness or derangement of intellect that will excuse crime, you may lay such information alongside, as it were, of the testimony of the witnesses produced by the prisoner, and determine whether that testimony is sufficient to protect the prisoner against an adverse verdict. And while we shall not, as we have not the right to do, express any opinion upon the nature of that evidence as it strikes our minds, it is our duty to warn you to

be very careful before you allow it to control your minds. The worst that was proved with reference to this subject anterior to the commission of the act, was that the prisoner was subject to seasons or periods of low spirits. We need not remind you, though it is right we should do it as a fact of common experience of which you have the right to take notice without any proof, that a great many people, perfectly responsible criminally as well as civilly for all their acts, or conduct, are subject to low spirits. Nay, it would be hard to point out any who are entirely free from them, unless they are of that small class of accountable human beings who seem to be incapable of ever taking any but a roseate review of life. It is true some are very much more under the influence of a low state of feeling than others; and not a few of our fellow creatures are at times hypochondriac; but even that is not any evidence, without other facts, of a want of knowledge of the right or wrong of an act. There must be something more, in our opinion, than this; there must be superadded to mere low spirits a natural weakness of mind or acquired insanity, that renders its possessor incapable of determining when he is about to do a thing, whether it is right or wrong to do that act. He must be, in fact, in the same state or condition of incapacity to distinguish between wrongful and rightful act, that is a babe in its mother's arms. And as the law will not, because it has no means to do it, measure the capacities of men, where there is any to be measured; so it holds every person responsible for the natural and probable consequences of his acts, or conduct, who has any capacity to distinguish between their rightfulness or wrongfulness. Without some such capacity there can be no will, for there is no mind, and without will or mind to do an act, no intent to do it can be predicated, or assumed of any man's conduct.

I have said there is no evidence whatever before you that the prisoner at the bar was anything but low spirited before the time he caused the death of George Babe and the three other victims of his conduct: and there is none.

It is true an accident is proved to have happened to him in 1868; that he fell from exhaustion, or from what is known as sun-stroke in 1873; and received a blow from the falling limb of a prostrated tree in 1875, but none of the witnesses who proved these circumstances prove that, his mind, or power to distinguish between right and wrong was affected, more than for a few weeks at most, and during that time it is not averred by the witnesses that there was an unusual appearance of mental affection. This, as I recollect, seems to be the substance of the testimony as to the prisoner's mind before the act committed. The first evidence you have having any tendency to show want of responsibility points to a period subsequent to the tragedy, and is mainly that of persons who served upon the coroner's jury. They have expressed their opinions with respect to the state of the prisoner's mind as shown, they consider, by his conduct, at the time the inquest was upon its travels to ascertain the facts about the killing of the four men who met their untimely deaths upon the fatal train, and passed without the least warning into that dread hereafter for which the best among us are in need of some preparation. Those opinions if we give all of them, at least, as much, if not more force than they all expressed, amount to opinions only of men, certainly not any better qualified than yourselves to draw conclusions from facts. They are not experts, that is, persons of scientific skill, on experience, so far as you or I know, to pass upon the mental states of men. They have, therefore, no special qualification to enlighten your minds upon a subject that has oftentimes baffled the scrutiny of the specialist, or person who has made a study, or specialty, of the subject of insanity. But they do give you facts and it is for you alone to judge whether, in your consciences, you believe them to be such as should acquit the prisoner. It seems, from the testimony of these jurymen that when the coroner took the prisoner to the scene of the wreck, he gave to them the same account of his performance on that fatal night of the 29th of June last, that he had given be-

fore to the witnesses for the prosecution; but the latter, we may suppose, discerned nothing in his conduct or manner which challenged their attention, more than, perhaps, the natural concern which one not a fiend or idiot, would evince when reviewing the scene of his most dire transaction. The witnesses for the defense describe his agitation, haggardness, apparent absence of mind, in biting his hat and finger nails, and wild look out of the eyes. This is that upon which they base their opinion that he was then not in his right mind, or capable of distinguishing right from wrong. Could any mortal being be expected to be calm, self-possessed, sedate, when confronted with the accessories of such a disaster, and standing upon the very spot where it occurred? We leave the answer to that to you, who alone are to deal with the facts of this case. We forbear to go one step even further in presenting this testimony, lest we may in some way, not legitimate for us, influence your minds with respect to the weight you ought to allow it to have in making up your verdict.

Finally—if you should not be satisfied in your minds beyond a reasonable doubt, that is, unless you should be clearly of opinion upon the evidence before you, that the prisoner meant in fact to produce, or in legal presumption contemplated the consequences of his unlawful act, you should acquit him of either degree of murder, and convict him of manslaughter only. In such case your verdict should be not guilty in manner and form as he stands indicted, but guilty of manslaughter. On the other hand you should find him guilty of murder of the first, or murder of the second degree, as you may consider the testimony will warrant you in doing. And if, after considering the whole case you shall not be satisfied in your own minds, from the testimony of the witnesses, that the prisoner at the bar, at the time of the wrecking of the train and the killing of George Babe, was capable of knowing that he was doing a wrong act, you should find him not guilty of any crime.

Verdict,—Guilty of manslaughter.

COURT OF GENERAL SESSIONS

OF THE

PEACE AND JAIL DELIVERY.

THE STATE v. ISAAC JACKSON AND JOHN JOHNSON.

In an indictment for larceny consisting in the stealing of wheat grown on a farm and from a barn on it which belonged to a married woman in her own right, the property in the wheat stolen may be laid in her husband, if he usually receives, sells and disposes of the proceeds and crops of the farm for his own use with her consent, and she claims to exercise no control or ownership over them.

Kent County, Court of General Sessions, &c., October Term 1879. The indictment against the defendants was for larceny in stealing six bushels of wheat of the goods and chattels of Gideon Speakman in Duck Creek hundred. The proof was that the farm on which the wheat was grown and the barn from which it was stolen, belonged to the wife of Mr. Speakman in her own right, and not to him; but it further appeared from his evidence that he usually sold and disposed of the proceeds and crops of the farm for his own use with her consent, and that she neither exercised, nor claimed to exercise, any control or ownership over them. And on this evidence the objection was made that the property in the wheat stolen should have been laid in the wife, Mrs. Speakman, and not in the husband, Mr. Speakman, as the late statute for the benefit of married women makes all the real estate of a mar-

ried woman, and its rents, issues and profits her sole and separate property.

The Court, Comegys, C. J., charged the jury, that but for the evidence in the case that the husband had usually received, sold and disposed of for his own use, the proceeds and crops of the farm with the wife's consent, and that she in fact exercised and claimed to exercise, no actual control or ownership over them, the Court would have been bound to sustain the objection on the ground stated; but if the jury were satisfied from the evidence that such was the case, then the husband, Gideon Speakman, had such a possession of, and property in, the wheat stolen, that the property in it might with propriety be laid in him in the indictment.

Gray, Attorney General.

Watson, for the prisoners.

Verdict—"Guilty."

COURT OF OYER AND TERMINER.

THE STATE *v.* HUGH DUGAN.

Murder of the first degree is where the killing is with express malice aforethought with respect to the victim himself, or where the victim was not the subject of the malicious purpose, but another person was.

Excusable homicide on the ground of accident; and justifiable homicide in defense of one's person, or of a member of his family, or of his dwelling house; and manslaughter, defined.

Malicious homicide which embraces only one general crime, that of murder, divided into two degrees, murder of the first degree and murder of the second degree, defined.

In case of the homicide, or killing of one person in the attempt to kill another, the jury must decide from the evidence under the instructions of the Court as to the law applicable to it, what the offense would have been had he killed the person intended, for in such a case his offense will be what it would have been if he had killed the person he attempted to kill.

New Castle County, November Term, 1879. At a Court of Oyer and Terminer held at this term, Hugh Dugan was indicted and tried for the murder of Richard H. Rowe, of the first degree, in the city of Wilmington, on the thirty-first day of May preceding. There were two counts in the indictment, the first of which charged him in the usual form with the murder of Richard H. Rowe with express malice aforethought, and of the first degree under the statute; and the second with the murder of him with express malice aforethought, and of the first degree under the statute, in feloniously and willfully attempting to perpetrate a crime punishable with death, to wit, to kill and

murder with his express malice aforethought one Edward McGaughey, he shot and killed the said Richard H. Rowe, with all the averments usual in such a case to charge him with the murder of the said Richard H. Rowe with his express malice aforethought, and of the first degree under the statute, which provides as follows: "Every person who shall commit the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree and of felony, and shall suffer death." *Revised Code, Chapter 127, Section 1.*

Mr. Gray, the Attorney General, having been of counsel for the prisoner prior to his appointment to the office, did not appear in the trial of the case, and the prosecution of it was conducted in his absence by Mr. George H. Bates and Mr. Cooper, the Deputy Attorney General.

The prisoner at the time of the killing resided with his family and kept a saloon in the house at the southeast corner of Heald and Thirteenth street in the city of Wilmington, with a sitting room and a bar room adjoining it on the first floor of it, with the front door or the door leading into the bar room on Heald street, and a door on Thirteenth street opening into a passage between the sitting room and bar room and leading from the former into the latter behind the bar of it, with a window in the sitting room on Thirteenth street, at which the prisoner was seated in the sitting room with the window half up between four and five o'clock in the afternoon of that day, Saturday, the 31st of May last, with both of the outer doors fastened, when Edward McGaughey came to the saloon, and finding both of them fastened, went to the window of the sitting room where the prisoner was seated, and asked him why the saloon was thus closed up and he could not get in, and was told by him that he had ordered the saloon to be shut up, and it would not be

opened again that day, but going to the window of it and looking into the saloon, he saw two colored men in it near the bar, and then went back to the sitting room window and cursed and abused the prisoner because he would not let him in, and threatened that if he did not let him in, he would break the door in and would whip him, which he said he could do in two minutes. He then went to the door on Heald street and again attempted to open it. Richard H. Rowe, the deceased, who with Mrs. Dugan the wife of the prisoner, had been in the sitting room with him while McGaughey was abusing and cursing him at the window of it, then remarked, for peace sake let us admit him, and went to the door on Thirteenth street followed by the prisoner close behind him, and unbolted the door and let him in, the prisoner saying nothing until he entered, when he called him a rascal and told him he had tried to raise a fuss with him, and he would give him enough of it. McGaughey then struck at the prisoner with his fist and slightly grazed him on his breast, but by quickly moving back a step the prisoner avoided the full force of the blow. McGaughey then drew back his right arm to strike him another blow when Mrs. Dugan caught him by the arm and prevented him from striking the prisoner, who then passed quickly into the bar room, while McGaughey, Rowe and Mrs. Dugan passed into the sitting room, and where Rowe and McGaughey commenced talking together and standing face to face, Rowe with his hands resting on McGaughey's shoulder, with his back to the bar room, and McGaughey facing it. There was a small revolver lying on a shelf behind the bar in the bar room, and as the prisoner passed into it and when about five feet from the door-way leading into it, he was seen to take the pistol from it, and stepping to the sitting room door he raised it to a level with his shoulder and pointing it in the direction in which Rowe and McGaughey were still standing as before described, fired one barrel of it, when Rowe immediately fell to the floor and soon after expired. Rowe was considerably taller than McGaughey,

and it was further observed that just as the pistol was discharged McGaughey who was directly facing it, dodged his head, while at the same instant Rowe turned his to the left in the direction of it. The post mortem examination of the wound disclosed that it was produced by a small pistol bullet which penetrated the back part of the left temple and passed almost horizontally across the base of the brain and slightly backward from the point of entrance to the depth of six inches. Some of the witnesses stated that it was not more than two minutes after McGaughey had entered that the pistol was fired, and others that it was not more than four minutes. Immediately after the pistol was fired the prisoner went to the door on Thirteenth street and exclaimed, for God's sake went some one run for a doctor, I have shot poor Dick! And no one responding to his call, he afterwards went in search of the nearest physician, and meeting a policeman on the street informed him of the occurrence and said he would give himself up, and when asked by him how it happened, he stated that Rowe had opened the door and let McGaughey into his house, and he shot at McGaughey and killed poor Dick. It was also proved that the prisoner and the deceased had always been on friendly terms.

Bates and Cooper, Deputy Attorney General, asked the Court to charge the jury as to the character and degrees of the crime of murder and its necessary ingredients; and that the law presumed malice from the act of killing, and the burden rested on the prisoner to show the contrary by competent evidence. *Whart. on Homicide*, 178. *Com. v. York*, 9 *Met.* 93. *State v. Ward*, 5 *Harr.* 499. *State v. Windsor*, 5 *Harr.* 538. And particularly would malice be presumed in law from the use of a deadly weapon when it was committed without any, or a considerable provocation. *Kilpatrick, v. Com.* 31 *Pa.* 198. And if the prisoner out of malice towards Edward McGaughey shot at him, but missed him and killed Richard H. Rowe, that it was no less a murder than if he had killed Edward McGaughey,

the person intended; and whatever would have been the offense had he killed McGaughey, was the offense in killing Rowe. Or in other words, the intent with which the ball was fired, fixed the grade or character of the crime, and if it was fired with malice, malice rode upon the ball, and if the death of a reasonable creature in being resulted therefrom, it was murder, and if fired with express malice aforethought, it was murder of the first degree. *Agnes Gore's Case*, 9 Rep. 81. 1 Hale, 436. 1 Hawk. 99. *Saunders's Case*, 473. 1 Russ. on Crimes, 452. *Rex v. Lewis*, 25 E. C. L. 373. *Rex v. Conner*, 32, E. C. L. 696 *Whart. on Homicide*, 42, 44. 1 *Whart. on Crimes*, Sec. 712 2 *Whart. on Crimes*, Secs. 965, 967, 997. *The State v. O'Niel*, ante p. 468.

That under the second clause of the first section of our statute if the jury should believe that at the time the fatal shot was fired, the prisoner with express malice towards Edward McGaughey intended to kill him, then he was attempting to perpetrate a crime punishable with death, and that the killing of Richard H. Rowe while engaged in such an attempt was murder of the first degree. *Rev. Code* 764, Sec. 1. And even, if the jury should believe from the evidence that McGaughey assaulted the prisoner, unless the assault was of a grossly aggravated character and the prisoner resented it immediately in the heat of blood, it could not reduce the killing below the crime of murder. 2 *Whart. on Crimes*, Secs. 970, 971, 972, 985. 1 *Russ. on Crimes* 433, 435. *Kilpatrick v. Com.*, 31 Pa. 198. A trespass on another's land is not a sufficient provocation to reduce a homicide below the crime of murder. *Ros. Cr. Ev.* 769. And that no ordinary assault, or even battery, will justify the use of a deadly weapon. *Whart. on Homicide*, 188, 189, 194, 195. 1 *Russ. on Crimes*, 439. *Kilpatrick v. Com.*, 32 Pa. 198. But even, if the character of the assault had been a sufficient provocation in contemplation of law to reduce the killing from murder to manslaughter, provided it was committed immediately in the heat of blood, yet, if there had been, after the provo-

cation, a sufficient interval for the blood to cool and for reason to resume its seat before the mortal wound was given, the offense would amount to murder. 1 *Russ. on Crimes*, 442. *Whart. on Homicide*, 179, 180, 181, 182, 183. 2 *Whart. on Crimes*, secs. 984, 987, 990, 993, 996. *Rex. v. Hayward*, 25 *E. C. L.* 371. *Kilpatrick v. Com.*, 31 *Pa.* 198. And that while the plea of self-defense is a perfectly good one when made out, yet it must appear to the satisfaction of the jury that the prisoner when defending himself was in immediate danger of having his own life taken by his assailant, or of suffering enormous bodily harm, from which he could not escape but by taking the life of his assailant. *The State v. Brown*, *ante* p. 539. But when there was evidence of express malice, no provocation could either excuse or extenuate the offense. *Arch. Cr. Pr. & Pl.* 700. In conclusion they would particularly ask the Court to charge and instruct the jury in regard to the nature and sufficiency of the provocation required in law, to reduce a case of felonious homicide from the crime of murder of the first or second degree to that of voluntary manslaughter.

Bird, for the prisoner. There were two counts in the indictment, the first that in the attempt to kill McGaughey with express malice aforethought, the prisoner killed Rowe with express malice aforethought, and was therefore guilty of murder in the first degree, and was framed under the second clause of the first section of the statute. The other was a general count at common law based on the same allegation of fact, and for murder of the first degree, and was based on the assertion that he intended to kill McGaughey with express malice aforethought in the attempt made on his life, but missed him and killed Rowe, and upon the general principle of the common law, independent of the statute, that whatever would have been his offense had he killed McGaughey in the attempt, would be his offense in killing Rowe. And such was unquestionably the principle of law which must govern the case;

for if it would not have been murder with express malice and of the first degree under the facts and circumstances proved in the case, had he killed McGaughey in the attempt, then the killing of Rowe under the circumstances could not have been, according to that general principle of law, any greater offense, or with malice aforethought and murder of the first degree; therefore, if such was the character of it, the case did not, and could not come within the meaning or letter of the first section of the statute, or of the second clause of that section.

Express malice aforethought is where one person kills another with a sedate, deliberate mind and formed design, evidenced by external circumstances showing the inward intention, such as lying in wait, antecedent menaces, former grudges and concerted schemes to do the party some bodily harm. *Whart. Cr. Law, sec. 945.* And that was the definition of express malice aforethought necessary to be shown in order to establish a case of murder of the first degree under our statute, which this Court had always recognized and laid down. As distinguished from it, and constituting the criterion of murder of the second degree under it, malice aforethought is implied by law from any cruel, deliberate act however sudden, done by one person to another which results in his death, without any, or without a considerable provocation. *Stev. Dig. Cr. Laws, 384.* That is to say, where one suddenly kills another without a sedate, deliberate mind, and formed design to commit the act, and without any, or a considerable provocation, it constituted murder with implied malice, and of the second degree under the statute. *Whart. Cr. Law, sec. 1113. The State v. List, ante p. 133. 19 Wend. 569. 23 Ala. 28. 8 Mich. 150. 18 Mich. 314. 25 Mich. 406. 53 Ill. 295.* But malice whether express or implied, was a matter of fact to be proved to the satisfaction of the jury, for there could be no murder of either degree without proof of either express or implied malice. He then reviewed the evidence and contended that the gross and violent abuse of the prisoner by McGaughey at the window of

the sitting room on a public street of the city of Wilmington, because he would not let such a man into his house, his repeated threats to break in the door, and the violent assault made by him on the prisoner in his own house as soon as he was admitted into it by his unfortunate friend, Rowe, for the sake of peace, and to stop the gross abuse and violent threats he was then making on the street to break into and whip him in his own house, not only negatived the existence of either express or implied malice, but constituted such a provocation, followed as it instantly was by the discharge of the pistol at him by the prisoner, in the phrensy of sudden passion and the heat of blood produced by such an attack made on him in his own house, as would clearly suffice to reduce the offense to manslaughter at least. But he proceeded further and contended that if in such a situation and under such circumstances, the prisoner believed from the rage and violence and threats and the actual attack made upon him by McGaughey, that his life was in imminent peril, or he was in immediate danger of suffering great bodily harm from him, then he was justified in his attempt to shoot him in self-defense. He also contended that there was enough in the evidence to warrant the belief that even the firing of the pistol, as well as the melancholy result of it, was purely accidental on the part of the prisoner.

Bates, replied.

The Court, Comegys, C. J., charged the jury. This indictment which you are trying was found at the present term of the Court of General Sessions, and consists of two counts, or charges, the first for the killing of Richard H. Rowe by the prisoner at the bar, by means of a pistol shot, with express malice aforethought, that is, with express design in firing the pistol to take Rowe's life; the second charges the killing of Rowe to have been done in the execution of a design, on the part of the prisoner, as of his own malice aforethought, to take the life of Edward McGaughey. Both these counts charge murder of the

first degree, as the offense of taking Rowe's life; and such, as set forth in the indictment, the offense is. The statute of this State defines murder of the first degree as follows:

"Every person who shall commit the crime of murder with express malice aforethought, in perpetrating or attempting to perpetrate any crime punishable with death, shall be deemed guilty of murder of the first degree, and of felony, and shall suffer death." *Rev. Code, pp. 364, 365.*

You perceive, therefore, gentlemen, that these two cases of manslaying or homicide, as it is conveniently called, are murders of the first degree, the one where the killing is with express malice aforethought with respect to the victim himself; the other where the victim was not the subject of the malicious purpose, but another person entirely. The homicide in either case is, in law, a deliberately malicious one; and constitutes the crime of murder of the first degree.

The defense made by the learned counsel of the prisoner has a three-fold aspect; either that it was purely in self-defense or in defense of the prisoner's dwelling, or accidental, merely. If he has made out, either by the testimony of his witnesses, or otherwise by sufficient proof, then the prisoner is entitled to be acquitted of this charge; for the law of the land inflicts no punishment for a homicide committed by a person in the lawful defense of his person, his family or his possessions, or by pure accident.

This statement makes it necessary that we should describe to you the different kinds of homicide in order that you may clearly distinguish between them. There are homicides that are malicious and such as are not malicious. The latter, or the non-malicious class, are divided into three kinds or descriptions. First, justifiable, second, excusable; third, manslaughter. The former, or the malicious ones, are divided into two kinds; murder of the first, and murder of the second degree.

Justifiable homicide is where an officer takes another's life by unavoidable necessity, without any will, intention,

desire, negligence or inadvertence on his part, and therefore, without blame; as when a sheriff hangs a prisoner in pursuance to the sentence of a Court, and in strict conformity therewith; or where an officer, in due execution of his office, kills a person who assaults or resists him; or where a private person or officer attempts to arrest a man charged with felony and is resisted, and in the endeavor to take him, kills him; or if a felon flee from justice, and in the pursuit be killed, when he cannot otherwise be taken, and other cases not necessary to be stated.

Excusable homicide is that which is committed either first by misadventure or accident; where one is doing a lawful act and unfortunately kills another, as, if a person be at work with a hatchet and the head flies off and kills a bystander; or, if a parent is correcting his child, or a master his apprentice or scholar, the bounds of moderation not fairly exceeded, either in the manner, the instrument, or the quantity of punishment; if an officer in punishing a criminal, within the like bounds of moderation, or within the limits of the law; and in either of these cases death ensues. Or, secondly, in self-defense, which is when one is assaulted upon a sudden affray, and in the defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there was no other probable means of escape, he kills his assailant. To reduce homicide to this degree, it must be shown that the slayer was closely pressed by the other party and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. The jury must be satisfied that unless he had killed his assailant he was in imminent and manifest danger, either of losing his own life or of suffering enormous bodily harm. It closely borders on manslaughter, as in both cases it is supposed that passion has kindled and that blows have passed between the parties; but the difference lies in this; that in manslaughter it must appear either that the parties were in mutual combat when the mortal stroke was given, or that the slayer

was not in immediate danger of death; and in homicide by self-defense, it must appear either that the slayer had not begun to fight or that having begun, he endeavored to decline any further struggle, and afterwards, being closely pressed by his antagonist, he killed him to avoid his own destruction. Homicide is also excusable when committed in defense of the possessions of one's dwelling-house against a trespasser, who having entered, cannot be put out otherwise than by force, and no more force used, and no other instrument or mode is employed than is necessary or proper for that purpose. Manslaughter is the unlawful killing of another, without malice, either express or implied, and is divided into two kinds, voluntary or involuntary. Voluntary manslaughter is where one kills another in the heat of blood; and this usually arising from fighting or provocation. In the former case to reduce the homicide to manslaughter, it must be shown that the fighting was not preconcerted, and that there was not sufficient time for the passion to subside; for in the case of a deliberate fight the slayer is guilty of murder. And though there were not time for the passion to subside, yet if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder. Other illustrations might be given, but they are not necessary. When homicide is committed upon provocation, it must appear that the provocation was considerable, and not slight only in order to reduce the offense to manslaughter, and for this purpose the proof of reproachful words, how grievous soever, or of gestures or actions expressive of contempt or reproach, without an assault, actual or menaced, on the person, will not be sufficient if a deadly weapon be used. Thus the killing has been held to be only manslaughter, though a deadly weapon was used, when the provocation was by pulling the nose, purposely jostling the slayer aside in the highway; or other actual battery. So where one is engaged in doing or committing an act unlawful merely; or a lawful act in a careless or wanton manner, the offense is manslaughter. It is not necessary to give other illustrations.

Malicious homicide embraces only one general crime, that of murder; but there are two grades, or degrees of it; murder of the first, and murder of the second degree. The latter offense is created by our statute passed in 1852, and embraces all homicides which are designated as malicious by the common law, except those committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death, and they are murders of the first degree.

In order to determine whether a homicide is malicious, or not, you must have your minds informed as to what malice, as the term is employed in law, is.

The term malice is not restricted to spite or malevolence towards the deceased in particular; but it is understood to mean that general malignity and recklessness of the lives and persons of others which proceed from a heart void of a just sense of social duty and fatally bent on mischief. And whenever the fatal act is either committed deliberately or without adequate provocation, the law presumes that it was done with malice; and the person must show from evidence, or by inference from the circumstances of the case, that the offense is of a mitigated character, and does not amount to murder, and all cases of homicide, except those mentioned to you of an officer in the performance of his official duty and in the line of it, &c., are presumed in law to be malicious, until the party charged shows that the one committed by him was not. When a homicide is proved to have been committed, the immediate duty devolves upon the prisoner to show that he was not influenced by malice, in law, but committed the act upon sudden heat of passion from adequate provocation, in defense of his person, or that of a member of his family, or of his possession, when the act was necessary for that purpose, or that the killing was purely accidental. If he cannot do this, he must be convicted of one or the other of the degrees of murder, and of which of them, depends upon the proof on the part of the prosecution; for, although malice is presumed by law, yet before

a conviction for murder of the first degree can be had at the hands of the jury, it must be shown by the prosecution that the prisoner, at the time of the killing, was actuated by a sedate and deliberate purpose, or formed design, to take the life of the deceased. In doing this it is not necessary to show previous hatred, or ill-will towards the deceased, but only that, at the time the fatal stroke was given, he was influenced by a deliberate purpose to take life. And this deliberateness may be only for a moment; but it must be shown to exist by facts or circumstances. This is the kind of malice necessary to be shown to secure a conviction of murder of the first degree. Murder of the second degree includes all cases where there cannot be proved any act showing a design to take the life of the victim, but there is shown a purpose to commit some act deemed, by law, felony, or some unlawful act not felonious, but attended with such circumstances as show a disregard of any consequences that may follow from it, however fatal they may be.

With this exposition of the law of homicide, it is of course to be presumed that you have a clear understanding of such law; and so understanding, it is your duty to consider the facts of the case in the light of that law, and make up your verdict after a calm review of both.

In this case you have not any difficulty in deciding whether the deceased person, Richard H. Rowe, was killed by the prisoner or not; because by testimony not disputed, he declared himself that he had shot him. At the same time, however, he declared that he did not intend to shoot him but the witness, Edward McGaughey. And we may say to you, gentlemen, that we believe this statement to be true, the absence of all motive on the prisoner's part to take the life of Rowe being apparent. Here then, you have the case of the homicide or killing of one man in the attempt to kill another. Now what the crime is of doing that, you must determine by your verdict. In order so to determine you must decide according to the facts proved before you and the law as we have informed

you of it, what it would have been if executed upon McGaughey. Suppose Rowe had not been present, what would have been Dugan's crime if McGaughey instead of Rowe had been killed. This question you must decide before you can render a verdict. As I have before stated, the pleas of the defendant are, self-defense, defense of his possession, or accident.

With respect to the plea of accidental killing, we are justified in saying to you that you have no evidence that will warrant you in allowing it; and for the plain reason that such a defense is never allowed unless the act from which the fatality results, is perfectly lawful and innocent in itself. To point a loaded weapon at another in an angry manner is itself an assault, which is an unlawful act, and, therefore, death resulting from it is in no sense excusable, but is felonious. Besides the ball from the pistol could not have done the execution in the case of Rowe which it did unless the weapon had been aimed in the direction where he and McGaughey were standing. How then can an act be called accidental, when it is the natural and probable consequence of pointing a weapon, (a firearm, for example,) in the direction of a person within shooting distance and pulling the trigger. As in this case there is no proof that the pistol was in the habit of going off against the will of its possessor; it must be held, in reason, that the ball was discharged from it by means of the powder in it, and the force applied to the trigger by the prisoner.

We come now to the plea of self-defense upon which the defendant chiefly relies, and defense of possession. As already stated to you, the plea of self-defense does not avail unless the prisoner can show that he was, at the time he took the life of the deceased, in imminent danger of his own life, or of receiving some grievous or enormous bodily harm. Has the prisoner furnished you with any proof that at the time of the shooting, he was in any danger whatever to his life or person? If so, what is it? There are three witnesses who testify to the circumstances

attending the shooting, and they are all who saw them. They are Coleman, McGaughey and Caven. The first states that he saw McGaughey strike at the prisoner in his sitting room; that he grazed his breast and stomach; but Dugan fell back so that the blow did not hit him full; that he threw up his hands and had nothing in his hands. As McGaughey struck Dugan he said you son of a bitch; didn't see Rowe at this time; Mrs. Dugan got hold of McGaughey's arm and pulled it back, and as he did so Dugan pulled his pistol from his hip pocket; the witness then went back to the counter in the bar room, looking backward and forward, and as he looked into the sitting room the second time Dugan fired. McGaughey and Caven state, in their testimony, substantially the same facts, that is, that they went in Dugan's sitting room together, that Dugan rushed at McGaughey who repelled him with a push; that Dugan left the room and soon afterwards returned to it, but not till after McGaughey and Rowe had withdrawn to the rear corner of it to converse; and that while there Dugan returned, and without any word or expression, fired his pistol in the direction of McGaughey and Rowe, striking the latter in the temple and killing him very shortly afterwards. There being no dispute about the fact of killing, you are to decide whether the act of discharging that pistol was necessary for the present defense of the prisoner's own person, or that of his dwelling house. Unless it can be shown in a case, where the plea of the prisoner is defense of possession, that he resorted, first, to the usual steps for expulsion, as by the use of moderate means, and never to the ultimate one of taking life until all others failed, he cannot protect himself from the consequence of a felonious homicide. There is no proof that at the time of the shooting, McGaughey was attempting to do anything. Coleman only saw, as he says, the blow of McGaughey's fist that grazed the prisoner's person, and no actual blow of violence upon it. He then saw the prisoner pull out his pistol from his hip pocket, and, being scared himself, he

walked back to the front door of the bar room; that he stopped there a second or two and then came back to the counter, and as he looked into the sitting room the second time, he saw Dugan fire. Taking this to be the only testimony of anything that occurred, can you find from the exposition of the case we have given you, that at that time the person of Dugan was in danger of a mortal stroke or of enormous harm? This is a question for you to decide; and if you cannot do it conscientiously, from the proof made before you, you cannot allow the defendant the benefit of that plea. But then it is your duty to consider the other testimony offered by the State with respect to the homicide. Both McGaughey and Caven state to you that the first assault made upon the occasion of the homicide was by Dugan himself and that not in the course of an effort to expel McGaughey from his premises, for they do not say, nor does it otherwise appear, by any proof, that Dugan gave any order even to him to leave the premises. On the contrary McGaughey states that when he went into the sitting room with Rowe, who had admitted him to the house, Dugan sprung at him and said "you son of a bitch, you have tried to raise a fuss with me and I will give you enough now." He says that he shoved Dugan back with his open hand saying "you damned fool, I don't want to hurt you," that he (Dugan) then passed into the bar room, and he (the witness) and Rowe then went over into the diagonal corner of the room; and whilst there conversing, with Row's hands upon his shoulders and his back to the sitting room door, Dugan returned from the bar-room with a pistol which he soon afterward raised and pointing it in the direction of himself and Rowe, fired it off, killing the latter almost immediately. Coleman says that Dugan was at the mantel-piece behind the bar where the pistol was, four or five minutes before he took it away and went to the sitting room door. This would be about the time that, according to the statement of McGaughey, must have been consumed in the conversation between him and the unfortunate deceased

before Dugan re-appeared in the sitting room. Coleman says that Dugan got the pistol before he saw the blow aimed at Dugan by McGaughey and the shot was about 12 seconds afterwards. McGaughey says that time enough elapsed after the assault was made upon him by Dugan for him to retire with Rowe to the rear of the room, and engage in conversation before Dugan returned. This is substantially corroborated by John Caven, who says, however, that when the pistol was first shown he was near Dugan, and finding it leveled so that it might kill him, he said "Hughey, don't do that;" that he thus pointed it fatally in the direction of McGaughey and Rowe, the latter of whom received the ball intended for McGaughey. I say intended for McGaughey, because the prisoner declared to the witness, Whelan, that he shot at McGaughey and killed Rowe. Now, gentlemen, it is your duty to consider the testimony of these witnesses and reconcile it if you can. If you cannot, then you must give your confidence where you think it should rest. Witnesses have testified that McGaughey has a bad reputation for telling the truth, and they would not believe him on his oath. Others, on the contrary, but not so many, though apparently of equal respectability, have testified to you that his reputation for veracity is good, and they would believe him on oath. The law presumes that every man has a good character, which of course, includes that of telling the truth; (for no habitual liar can have a good character;) it is for you to decide, therefore, whether that presumption, and the proof in support of character are overborne by the testimony as to bad character for veracity. But the testimony of McGaughey is fortified by that of Caven, who says he was present in the room where the tragedy happened; that he went there with McGaughey and saw all that occurred. Whether he was there or not is for you to decide; but as his character for telling the truth is unimpeached, and he swears positively that he was there, it ought to have more weight as to that fact, than that of Coleman who was not in the sitting room, but says he did

not see him in the house, because Caven's testimony is of a positive fact and that of Coleman is negative entirely, it being a rule for estimating the value of evidence, that, other things being equal, positive proof is of more importance than negative proof. But you are to judge of the value of all this testimony. The only witnesses of the act of Dugan who can give testimony have sworn to their respective statements before you, your verdict must be rendered, however it may be, upon them and them alone, and the declarations of the prisoner himself, which are in evidence also. Now it is a rule in the trial of cases, that where any statement made by the person on trial and relied upon to convict him is given in evidence, a jury must take all that he said upon that occasion. In this case you must take all that Dugan said when confessing that he committed the act; but you are not bound to believe it all. On the contrary, if you find it contradicted by other proof satisfactory to your minds, you are bound to reject it. He stated to Whalen that "Rowe let McGaughey in and I fired at McGaughey and struck Dick," using his language as given by the witness. Now this would imply that Rowe was shot as he opened the door to let McGaughey in, whereas we do know, from the testimony of Coleman, McGaughey and Caven, that some time had elapsed after Rowe admitted McGaughey, before the fatal shot was fired.

There does not seem to be any evidence whatever before you, if you reject the explanation given by Dugan, that he was acting in defense of his possession, when he killed Rowe; for he made no active effort to prevent McGaughey from coming in, nor did he order him out, or make any effort to expel him after he came in. Now the law of defense of possession is this; a party has the right to resort to any means to prevent another from entering his house, and they may be the extreme means of taking the life if the entrance cannot otherwise be prevented; so if one is in the house of another and is ordered to leave it, and refuse to go, the occupier has a right to expel him:

but before resorting to violent means he must endeavor first to expel him by gentle means; if they are resisted, he may use force enough to overcome the resistance, no matter to what intent such force may go. For every man's dwelling is his castle of defense, and he has a right to enjoy it without molestation from any quarter. But the law is very tender also of human life, and will never allow it to be taken, in defense of person or property, until all reasonable efforts to do it otherwise are exhausted. In a case where a man assailed is not in his own house, he must retreat so far as he safely can before taking the life of his assailant, unless the suddenness of the attack deprive him of power to do so. This, however, does not apply when a man is attacked in his own house; for that is his place of retreat and security and he may instantly kill his assailant if he is attacked suddenly in such a way as to place his own life in peril, or his person in danger of grievous or enormous bodily harm.

We have now, gentlemen, given you the law of this case, with such remarks, with respect to the testimony as we thought proper to make; and the case is now left with you for your determination. The fact of shooting at McGaughey is confessed; the consequence of that act was the killing of Rowe. Dugan is therefore guilty of whatever crime he would have been guilty of if he had killed McGaughey. If you believe from the testimony of the witnesses, and the law as expounded for your enlightenment, he was in danger of his own life or of great bodily harm when he fired; if there were any facts to show that he was endeavoring to expel McGaughey from his house, and being resisted he fired as a necessary means of compelling obedience to his efforts, it would be your duty to acquit him entirely. If, on the contrary, you believe from the testimony that neither of these defenses is available, you should convict him of one or the other of the degrees of murder, and of which one we leave you

to determine upon a review of all the testimony, and recalling the explanation of the law we have made to you.

Verdict—"Guilty of Manslaughter."

INDEX.

ACCESSARY. See RAPE, 4.

ACCIDENT. See HOMICIDE, 69. 90.

ACCOMPLICE. See p. 76; 324-31; 317-20—when a witness.

See HOMICIDE, 52.

ADMISSION. See CONFESSION.

ADULTERY. See HOMICIDE, 43.

APPEAL IN BASTARDY.

1. On the trial of an appeal in bastardy, the father of the mother of the child is a competent witness for the State, although the mother was a minor, and was living in his family at its birth.

2. A bastard child begotten in another, but born in this State after the removal of the mother into it, acquires by its birth here a legal settlement in it, and in the county in which it is born. *Smith v. The State*, 107.

APPRENTICE.

1. In a case of binding under the third section of the statute, it is sufficient if the approval of the justices appears anywhere in or upon the indenture.

BIGAMY.

All felonies in this state are expressly and specially made so in all cases by statute, and therefore there are none here at common law; and as the offense of bigamy is but a misdemeanor, and not a felony in this state, to allege in an indictment that it was feloniously and unlawfully committed will be fatal to it. *The State v. Darrah*, 112.

BURGLARY.

1. Where there are several distinct, and independent felonies charged in an indictment, the Court will require the Attorney General to elect on which of them he will contend and rely for a conviction after all the testimony in the case has been heard on the trial of it; but not when all the counts in the indictment are for the same alleged felony, or on an indictment for burglary in which the same breaking and entry of the dwelling house is alleged in all the counts with intent to commit different and distinct felonies specified and alleged in them.

2. The crime of burglary is the breaking and entering of the dwelling house of another in the night time with intent to commit some felony in it, whether such felonious intent be executed or not. Both breaking and entering are necessary to constitute the offense, and it must be in the night time, when there is not sufficient daylight or twilight begun or left to discern the countenance of a person. But this does not extend to moonlight. A very slight breaking is sufficient, such as forcing open a door, picking a lock, pulling back a bolt, breaking a window, taking out a pane of glass, lifting up the latch of a door, or the like; and even, the pulling down or raising up of the sash of a window, although it has no fastenings and is only kept in place by its own weight, or its pulley weight, and if an outer door being open the burglar enters through it and unlocks or unlatches a chamber door within the house, or if to escape he breaks his way out of the house, it is a sufficient breaking in contemplation of law to amount to a burglarious breaking into the house.

3. The jury must be fully satisfied from the evidence that the prisoner was the man that broke and entered the dwelling house as charged in the indictment, but this may be proved by either direct or circumstantial evidence.

4. The jury must also be satisfied from the evidence that the prisoner broke and entered the dwelling house alleged with intent to commit in it some one of the felonies alleged in the several counts of the indictment, and all of which allege the same break-

BURGLARY, Continued.

ing and entering into it by him with the different felonious intents respectively alleged in them. And the intent with which he broke and entered it must be proved as any other fact in the case must be, by direct or circumstantial evidence indicating the intention to the satisfaction of the jury.

5. In general the intent may be presumed from what the accused actually did in the house after breaking and entering it; if he committed a felony, it may be fairly presumed that he broke and entered it for that purpose. But a person who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend to commit that particular offense.

6. If the prisoner when he cut the girl Lizzie Griffith on the neck and temple or face, intended to kill her, it may fairly be presumed in the absence of proof to the contrary, that he broke and entered the house for the purpose of killing her.

7. In doubtful cases, as where there is great conflict of testimony on material points, or where the evidence for and against the the accused is pretty nearly balanced, previous good character is entitled to due weight, and should incline the scales in favor of the prisoner; but where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to little, if any weight or consideration. If, however, after thoroughly examining the evidence and maturely considering it, the jury should entertain any reasonable doubt of the guilt of the prisoner, such as honest and conscientious men acting under the solemn obligation of their oaths, and in full view of all the testimony, feel themselves constrained to entertain, he is entitled to the benefit of such doubt, and their verdict should be in his favor. *The State v. Manluff*, 208, 209.

8. In an indictment for burglary in the dwelling house of a father, and stealing therefrom sundry articles, consisting of ornaments, merely and not necessities, belonging to a minor and unmarried daughter then living in the house with him and his family, the property in them should be laid in the daughter and not in the father. *The State v. Lee*, 335.

9. On an indictment for burglary with intent to commit a rape, the alleged intent is a material and substantive fact to be proved to the satisfaction of the jury, as much so as any other material allegation in it; and they must be satisfied from the facts and circumstances attending it, that the breaking and entry was made by the prisoner with the intent to commit the alleged rape

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BURGLARY, Continued.

with force and against the will of the party named. *The State v. Carpenter*, 367.

10. On the trial of an indictment against several joint offenders, it is not competent for the prosecution, after a witness for the State has answered that he knows only two of them, to ask him the question by what names, and when and where he had known them, because it might in that way indirectly impeach their character.

11. As to the relative weight and value of direct and circumstantial evidence which are alike admissible in Courts of justice, neither species is absolutely infallible; nor can the one, perhaps, be said to be less so than the other, so far as the results of criminal trials have enlightened them on the subject. But to warrant a conviction in any case on circumstantial evidence merely, it should be such as to exclude to a moral certainty, every hypothesis but that of the guilt of the accused of the offense charged, and that the hypothesis of his guilt should flow naturally from the facts proved, and be consistent with them all.

12. The crime of burglary consists in breaking and entering into the mansion or dwelling-house of another in the night-time, with the intent to commit a felony therein. And the breaking into it may be an actual breaking, or a constructive breaking, as it is termed in law.

13. An actual breaking may be by forcing open a door, picking or opening a lock, breaking a window, or taking out a pane of glass, taking out nails or other fastenings, the turning of a key where the door is locked, or the unloosening of any fastening, the raising of a window, or even by the drawing or lifting of a latch; for all these have been held sufficient to constitute an actual burglarious breaking in contemplation of law.

14. But breaking by construction of law, or a constructive breaking as it is otherwise called, is where an entrance is obtained by threats, fraud, or conspiracy, as by threats to burn the house unless the door is opened, or where in consequence of violence commenced or threatened in order to obtain an entrance, the owner the more effectually to repel it, opens the door and sallies out, and the felon enters, or where the entrance is obtained by procuring a servant or some inmate to remove the fastening, or when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, or where some trick or artifice is resorted to for the purpose of inducing the owner to unlock or remove the fastening and open the door, and the felon enters, as if one knock at

BURGLARY, Continued.

the door on pretense of business, or counterfeits the voice of a friend and the door being thereupon opened, the felon enters: all these and their like have been held to constitute cases of constructive breaking on the trial of indictments for the crime of burglary.

15. The intent to commit the felony alleged in the indictment is a substantive and material fact asserted in it, and must be proved to the satisfaction of the jury, as much so as the breaking and entry, or any other material fact alleged in it, in order to constitute the crime of burglary. *The State v. Carter, et al.*, 402, 403.

CIVIL RIGHTS BILL.

1. So far as the act of Congress, termed the civil rights bill, assumes to compel, regulate, or control the admission of evidence in the courts of this State, it is inoperative, unconstitutional and void.

2. The negro on whom the assault and battery alleged in the indictment was committed, is a competent witness on the trial of it for the prosecution against a white man, although there was a white witness present when it was committed. *The State v. Rash*, 271.

COIN. See INDICTMENT, 1.

CONFESSION.

In criminal confessions the Court will presume that the magistrate has performed the duty enjoined upon him by law, and reduced the admission or statement to writing, but not that it was assented to or signed by the accused after having been read over to him, and without proof of such fact, parol evidence of it is admissible. *The State v. Vincent*, 11.

See ARSON, 2. RAPE, 4. HOMICIDE, 51, 62, 86.

CONSPIRACY.

The gist of the offense alleged in an indictment for a conspiracy to do an unlawful act, consists in the agreement to commit the act, and it is complete as a conspiracy and indictable as such, without doing any overt act in execution of the agreement, or of the design with which it was entered into.

Upon an indictment alleging that the two persons named in it conspired together, and with divers other evil-disposed persons whose names were unknown to the grand jury, to commit the crime alleged in it, one of them may be convicted, and the other acquitted, if the jury are satisfied from the evidence that any other person conspired with either of them to commit it. *The State v. Adams and Aiken*, 361.

CONSTABLE. See PEACE OFFICER.

CONSTITUTIONAL LAW. See ATTORNEY GENERAL, 1, 2. CIVIL RIGHTS BILL, 1. INDICTMENT, 7.

COUNTS. See BURGLARY, 1. JUDGMENT.

DEAF AND DUMB PERSONS. See HOMICIDE, 45, 46, 47.

DECLARATIONS. See CONFESSION. DYING DECLARATIONS. HOMICIDE, 52. RES GESTÆ.

DELIRIUM TREMENS. See HOMICIDE, 78.

DRUNKENNESS. See HOMICIDE, 5, 19, 21, 41.

DYING DECLARATIONS. See HOMICIDE, 13, 30, 31.

ELECTION. See ILLEGAL VOTING.

EVIDENCE. See CONFESSION. APPRENTICE, 3. INDICTMENT, 4. ARSON, 1. BURGLARY, 3, 4, 5, 10. CIVIL RIGHTS BILL, 1. ACCOMPLICE. RAPE, 4. RECORD, 1, 2, 3, 4, 5, 6. HOMICIDE, 49, 51, 52, 58, 62, 65, 66, 67.

FELONIES. See INDICTMENT, 7, 9.

FELONIOUS INTENT.

If a party wantonly and recklessly discharges a loaded pistol into a crowd or group of persons casually collected on the arrival of a train at a railroad station regardless of whom he may wound or kill by it, and wound one entirely unknown to him, on an indictment for an assault with intent to kill such person, he will be presumed in law to have intended the probable consequences of his own act under such circumstances, and will be guilty of an assault upon him, but not of the intent to kill him without proof of such felonious intention like any other material fact in the case. *The State v. Sloanaker*, 62.

See BURGLARY, 2, 4, 5, 9, 12, 15. RES GESTÆ, 2.

FORGERY.

The records of a Justice of the Peace are not records of a Court of Record in the true import and legal signification of that term, and a forgery of such a record by a Justice of the Peace is not within the provision of the statute, which makes the forging of the record of a Court of Record an indictable offense. *The State v. Floyd*, 110.

FRAUDULENT PRETENSES.

A false and fraudulent representation made by the defendant to the prosecuting witness, that he was about to loan a sum of money to a person named by him and known to the prosecuting witness to be of good credit, and if he would let him have one-half of the amount, he would repay it to him in twelve days with

FRAUDULENT PRETENSES, *Continued.*

one-half of the profits, imported among other fallacious representations, a false and fraudulent pretension of a present and immediate purpose on his part to loan the amount of money mentioned to the person named, and he was therefore indictable for obtaining the money thereupon loaned him by the prosecuting witness under such a false and fraudulent pretense. *The State v. Nichols*, 114.

GOLD OR SILVER COIN. See INDICTMENT, 1.

HOMICIDE.

1. If a fight suddenly springs up between the prisoner and another on the one side, and the deceased on the other, in the course of which he receives a sudden blow on the head with a stick of which he dies the next day, with no other evidence of premeditation or deliberation, it will constitute the crime of manslaughter only; and it matters not which of the two struck the blow, if the prisoner and his companion were engaged together at the time in the fight with the deceased. *The State v. Davis*, 13.

2. The Statute has introduced no essential change or alteration in the crime of murder as it exists at common law in respect to the malice which constitutes the offense, although it divides it into two degrees for the purpose of discriminating in the punishment and penalties imposed by it according to the proof and kind of malice with which it is committed. *The State v. Jones*, 21.

3. Neither fear, nor apprehension of death, or of great bodily harm will totally excuse one person for killing another; but to have that effect in law the danger must be imminent and impending at the instant, and real, and not imaginary. He must also have declined the combat, and retreated from his assailant, as far as he could have done so consistent with his own safety, or it will amount to manslaughter. *The State v. Hollis*, 24.

4. Malice is the essential ingredient of murder, and is known to the common law as of two kinds, express malice and malice implied by law. At common law and under our statute, express malice exists when the killing is done with a sedate, deliberate mind and formed design, evidenced by external circumstances, such as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some great bodily harm. And malice is implied by law when the killing is done without such a sedate, deliberate mind and formed design, and there is no such fact or circumstance attending it which indicates coolness, deliberation, premeditation, or such preconceived design or purpose. When, however, it is suddenly done in the heat of blood or vio-

HOMICIDE, *Continued.*

lent passion, and on an adequate and sufficient provocation to produce it in contemplation of law, the implication of malice is repelled and rebutted, and it constitutes the crime of manslaughter.

5. Drunkenness is no excuse for murder, or any other crime; but a less provocation of the kind before referred to may suddenly heat and blind a man with angry passion in that condition than a sober man under the same provocation, and may be considered by the jury in determining the sufficiency of it to rebut the implication of malice and reduce the killing from murder in the first degree under the statute to second degree. See p. 36 and p. 91. And when antecedent menaces or threats, or revengeful expressions have been uttered by one in that condition, it is for the jury to consider and determine whether they were the idle and unmeaning declarations of a drunken man merely, or indicated actual malice and an intention to do what he threatened; for the law considers a drunken man capable of entertaining express malice. But as *mania a potu* is the secondary effect of intemperance, and is a species of insanity, it is a defense against any of these crimes when proved to the satisfaction of the jury.

6. If the jury after maturely considering all the evidence for and against the prisoner have a reasonable doubt that he killed the deceased, they should give him the benefit of such doubt; but such is not the rule in relation to the defense of insanity. *The State v. Hurley*, 28.

7. If death is produced by a deadly weapon, great must be the provocation to reduce the homicide from the grade of murder to the grade of manslaughter.

8. If two go out to fight, and after one has struck the other a blow with his fist merely, the other recovers his position and draws a knife, or has one drawn to the knowledge of his antagonist, and is near enough at the time to strike him with it, and makes any assault upon him with it, or any motion indicating an intention to strike him with it, and the other in a transport of passion suddenly draws his knife and deals him a mortal blow with it, the provocation will be sufficient to reduce the homicide under such circumstance to manslaughter. But if he did not strike the other at all, or after drawing the knife, he did not strike, or attempt to strike him with it, the provocation will not be sufficient to reduce it to manslaughter, but it will be murder of the second degree. *The State v. Anderson*, 38.

9. On the trial of a white man for murder his confession of the crime may be proved by a negro witness.

HOMICIDE, *Continued.*

10. If the jury believe and are satisfied beyond a reasonable doubt from the evidence that the prisoner killed the deceased as alleged by the State, then conceding all that had been alleged and proved by way of justification, excuse, or palliation of that killing on the other side, it could not show and establish a sufficient provocation in law to reduce it to the grade of manslaughter; for however unreasonable and unlawful the conduct of the deceased had been in refusing to appear at Court according to the tenor of his recognizance, and unfair and unjust as it undoubtedly was to his bail in that recognizance, the prisoner at the bar, and however violent might have been his threats to resist the rightful and lawful authority of his bail, the prisoner, to arrest him and take him to Court on the bail piece which he had taken out of it for that purpose, and whatever attempt he might have made upon the life of the prisoner in shooting at him in his carriage on the road the night before the killing, neither of them, nor all of them combined, could have the effect in law to mitigate and reduce it to the crime of manslaughter, if the act of shooting the deceased was committed by him with a sedate, deliberate mind and formed design, evidenced by his arming himself for the purpose and lying in wait for him, and after nearly, if not quite, twelve hours had elapsed since the circumstance last adverted to, the attempt had been made upon his life by the deceased; because such sedate deliberation, formed design and determination to kill another as that, would furnish in itself the strongest evidence of express malice aforethought, and of the crime of murder in law. *The State v. Downham*, 45.

11. In a fight between two persons, the use by one of a billet, a formidable implement heavily loaded with lead in the end, will constitute such a provocation as will excuse the other in drawing a knife and stabbing him fatally with it, and will reduce the killing to manslaughter. Where several were engaged in the assault upon the deceased, it is sufficient to prove that any of them inflicted the fatal wound, although it is alleged in the indictment that the one named inflicted it. *The State vs. O'Neal and others*, 58.

12. In order to reduce homicide in self-defense to such a degree as to render it entirely excusable or justifiable in law, the jury must be satisfied from all the evidence in the case, that the prisoner was in imminent and manifest danger of losing his own life or of suffering great bodily harm at the hands of the deceased. Even in such cases the law requires the party assailed to retreat as far as he conveniently or safely can to avoid the violence of the

HOMICIDE, Continued.

assault, before he resorts to such extremities, or as far as the fierceness of the assault will permit him, for it may be so fierce and so imminent as not to allow him to yield a step without manifest danger of losing his life or of suffering great bodily harm, and then he may kill his assailant instantly. *The State v. Newcomb*, 66.

13. The Court is, and always should be, cautious in admitting what are termed dying declarations in evidence, and will not admit them without being satisfied that they were not made until after all hope of ultimate recovery had been abandoned by the deceased.

14. Inasmuch as the recent statute in relation to murder and manslaughter employs familiar terms with reference to them, of fixed legal import at common law without any definition or qualification of their meaning, it must be understood to use them in the same sense in which they are employed at common law.

15. And therefore express malice aforethought which constitutes the essential ingredient of murder in the first degree, as provided for in the statute, means express malice aforethought at common law, and as it was recognized and understood in this state prior to the passage of the act.

16. And although it further provides that every person who shall commit the crime of murder "other than with express malice aforethought, or in perpetrating, or attempting to perpetrate any crime punishable with death," shall be deemed guilty of murder of the second degree, without the use of any terms to define or ascertain the meaning of the provision, except "otherwise" than with express malice aforethought, &c., as before mentioned, it must be understood to mean with malice aforethought implied by law in contradistinction to express malice aforethought, as the crime of murder cannot be committed at common law without either express malice aforethought, or malice aforethought implied by law.

17. The two kinds of malice aforethought, and the distinction between them at common law, and between murder of the first and murder of the second degree under the statute, and between them and the crime of voluntary manslaughter defined.

18. A mortal wound suddenly inflicted by a briar-scythe in the hands of the accused upon the party killed in an angry and personal collision between them, if done intentionally without sufficient provocation to reduce the killing to voluntary manslaughter, will constitute the crime of murder committed with

HOMICIDE, Continued.

malice aforethought implied by law, and murder of the second degree under the statute; but if not done by him intentionally, it will constitute no offense under the statute. *The State v. Buchanan*, 79.

19. The Court having left the question to the jury on all the evidence in the case, will not after trial and conviction of murder of the first degree, set aside the verdict and grant a new trial, because they did not charge them, as requested by the counsel for the prisoner, that if they believed that at the time of committing the act he was so much intoxicated as to produce a state of mind unfavorable to deliberation or premeditation, it would reduce the grade of the offense from murder of the first to murder of the second degree under the statute. *The State v. Bowen*, 91.

20. The statute in relation to the crimes of murder and manslaughter were not intended to make any change in the general criterion and characteristic of either of them as they existed at common law, and in this state before it was enacted, except to divide murder into two separate and distinct degrees, and modify and mitigate the common law penalty in the second and subordinate degree, as established by the statute.

21. If the evidence is sufficient to satisfy the jury beyond a reasonable doubt that the wife of the prisoner came to her death by congestion and compression of the brain produced by blows inflicted on the side of her head by the prisoner with his fist, neither the insults or reproaches of the wife charging him with infidelity, whether true or false, and however offensive and provoking they might have been, nor the intoxication with which he in turn charged her, if such was then her condition, could justify or excuse such a violent assault and battery upon her by him, although it was committed, and all the blows inflicted were made with his clinched fist simply; because the provocation could not negative and rebut the presumption which arises in such a case that the act was committed with malice aforethought implied by law under the facts and circumstances proved in the case.

22. Manslaughter in contemplation of law can only occur in an assault and battery, when both parties are combatants in it, or have been, and one of them in the heat of blood or a transport of passion produced by it, deals the other a fatal blow, or suddenly seizes, without deliberation or premeditation, and before he has had time to cool, a deadly weapon or instrument likely to produce death and kills him with it. *The State v. Hamilton*, 101.

HOMICIDE, *Continued.*

23. Express malice exists when one person kills another with a sedate, deliberate mind and formed design, the formed design being evidenced by external circumstances showing the inward intention, such as lying in wait, antecedent menaces, former grudges, or concerted schemes to do the party some bodily harm; and whenever it is committed with express malice aforethought, it is murder of the first degree under the statute.

24. Malice aforethought is implied by law from any deliberate, cruel act however sudden; as where one person kills another suddenly, without any, or without a considerable provocation, for no one, unless of an abandoned heart, would be guilty of such an act upon a slight, or no apparent cause; and when it is so committed, that is to say, with malice aforethought implied by law, and not with that sedate, deliberate mind and formed design which evinces express malice aforethought, it will be murder of the second degree under the statute.

25. A man's house is his castle; and when an attempt is made to commit arson or burglary in the dwelling-house of another, the owner or any member of his family, or even a lodger may kill the offender to prevent it; but he is not authorized to fire a gun or pistol, or to use a deadly weapon upon every invasion or breaking into his dwelling house which may be forcibly made in the night-time, for a trespass merely at any time will not warrant a resort to the last extremity in a sudden fit of anger and passion, and in such a case the provocation cannot reduce the killing to manslaughter. But when he is seeking to break in, in the night-time with intent to commit a felony, the owner may as soon as that reasonably appears, resort to the last extremity in repelling it, and the killing will be justifiable. *The State v. Horskin*, 116.

26. If a constable or a police officer is publicly assaulted and fired at with a pistol by one who had a previous grudge against him, and returns the fire and the latter then turns and flees and is pursued by the officer to his own dwelling-house, but before he can get the door entirely closed against him, and whilst he is struggling with all his strength to do so, the officer violently forces it open and rushes in with his pistol cocked in his hand, and is instantly shot and killed in the house by the latter, the killing will not be justifiable homicide or murder of the first or second degree, but as it was intentional it will be voluntary manslaughter; for if the officer's purpose was simply to arrest him for the offense just before committed in firing at him, the anger, passion and violence with which he forced his entrance into the house with a cocked

HOMICIDE, Continued.

pistol in his hand, and without first demanding to be admitted, exceeded the limits of his official authority to make it, and rendered the attempt to do so in the manner pursued by him unlawful. *The State v. List*, 133.

27. When one of two persons engaged in a mutual combat suddenly seizes from a number of knives lying on a table near at hand, and exhibits sufficient thought, reflection and discrimination to select one more dangerous and deadly than the rest, and stabs the other with it, and death ensues, it will be evidence of express malice aforethought, and murder of the first degree under the statute; and this conclusion of law is only the stronger when the party thus killing the other with such deliberation and formed design to kill her, or do her some great bodily harm, has had time after the combat has ceased between them, for her blood to cool and for reason and reflection to regain control over her passion. *The State v. Gardner*, 146.

28. Whether partial insanity can be held sufficient to exempt a person from responsibility for crime will depend upon the peculiar circumstances of each particular case. The nature, degree and intensity of the delusion, and whether the act done was committed under the direct and irresistible influence of the insane delusion, are matters of vital importance in determining the question of responsibility; for it is not always or necessarily an excuse for crime; on the contrary, it can only be so considered where it utterly deprives the party of his reason in regard to the act charged as criminal, and the prisoner's capacity or want of capacity at the time to comprehend the difference between right and wrong in respect to the very act with which he stands charged, is the test by which must be determined the question of his criminal responsibility. But the law presumes every man to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to the satisfaction of the jury; and insanity being matter of defense the burden of proving it to the satisfaction of the jury rests on the prisoner, unless it so appears, as it may sometimes, from the evidence offered on the part of the State. *The State v. Danby*, 166.

29. On an indictment and trial for the murder of one who has been shot, a declaration made by him twenty-five or thirty minutes afterwards, and after he had been carried from the place to his home, and been undressed and laid on his bed, that the prisoner shot him, and how he did it, is not admissible in evidence as a part of the *res gesta*.

HOMICIDE, Continued.

30. After proof by several witnesses on the preliminary enquiry before the Court that the deceased had declared on Saturday and on Sunday and again on Monday preceding his death on the following Friday, that he could not live, that he could not recover, two affidavits, the first made on Saturday and the second on Monday by him and taken by a Justice of the Peace in his bed-chamber, declaring that the prisoner shot him, and the circumstances under which he assailed and shot him, admitted in evidence as dying declarations of the deceased.

31. But on such preliminary enquiry before the Court to ascertain whether the deceased was under a due sense and apprehension of impending dissolution at the time when they were made and the affidavits were taken, it is irregular and contrary to the practice of the Court after the examination and cross-examination of the witnesses for the State on that point, to allow a witness to be called and examined on the other side to rebut or controvert their testimony. Such dying declarations, however, when admitted in evidence to the jury may afterwards be rebutted and controverted by the testimony of witnesses called on the other side in their regular course of examination; and if it is then proved that the deceased subsequently expressed hope of recovery, the weight and effect of such declarations before the jury will be very much weakened and impaired by it.

32. Murder with express malice aforethought, and of the first degree under the statute defined; also murder with malice aforethought implied by law, and of the second degree under the statute, and manslaughter defined.

33. When the killing is admitted the law presumes that it was done with malice aforethought, and it is incumbent on the prisoner to show that it was not by proof of such provocation or alleviation as will suffice in law to rebut the existence or implication of malice, unless it so appears from the evidence adduced against him in the case. *The State v. Frasier*, 176, 177.

34. In a trial for murder, neither the Court or the jury are to be governed in deciding the case by any thing contained in the statutes of other States, but solely by the statute of our own State. What was murder at common law is murder under our statute, and which merely divides it into two degrees, there being no such division of it at common law.

35. Malice aforethought is the essential ingredient and criterion of murder at common law, and is of two descriptions, express malice aforethought and malice aforethought implied by law; but

HOMICIDE, Continued.

in either case it was murder and punishable with death at common law, while a division is made in it in that respect by our statute; it being made by it punishable with death only when committed with express malice aforethought, or in perpetrating or attempting to perpetrate any crime punishable with death; and with fine, pillory, whipping and imprisonment for life, when committed with malice aforethought implied by law. The former is denominated murder of the first, and the latter murder of the second, degree by the statute. Malice in general and express malice aforethought, and malice aforethought implied by law, defined and distinguished.

36. In a case of mutual combat there is mutual provocation, and if in the heat of blood occasioned by it, one party kills the other without premeditation, it is manslaughter. But it must appear that it was done in the transport of passion produced by it, and before he has had time to cool, or reason to regain the control of his passion. All the circumstances of the case must show that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but was solely imputable to human infirmity; and this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm. *The State v. Green*, 217, 218.

37. Murder of the first degree under the statute is when the homicide is committed with express malice aforethought as described and defined at common law, or in perpetrating or attempting to perpetrate any crime punishable with death.

38. Murder of the second degree under it is when the homicide is committed with implied malice aforethought as described and defined at common law.

39. Voluntary manslaughter under it is when the homicide is willful and unlawful, but is committed under such circumstances of provocation or alleviation as will suffice at common law or under statutory provision, to rebut the implication of malice aforethought and reduce it below the grade of murder of the second degree.

40. Homicide *se defendendo* or in self-defense, is excusable or justifiable in law, but to constitute and establish this defense in any case it must appear that the party killing was not only in imminent and manifest danger of losing his life, or of suffering enormous bodily harm, and was closely pressed by his assailant,

HOMICIDE, *Continued.*

but that he sought to avoid it, and retreated from the violence of the assault as far as he conveniently and safely could, and that the killing of the assailant was necessary after having done this, to protect his own life, or to save himself from such bodily harm.

41. Drunkenness or intoxication is no excuse in law for crime, unless it be such as to render the party unconscious of what he was doing at the time. *The State v. Till*, 233.

42. The statute by which the two degrees of murder are established does not in any respect change the general law of murder. The common law definition of murder, together with all the rules and principles applicable to the crime remain as they were before the passing of the statute. Its only effect is to graduate the punishment according to the degree. Murder in the first and second degree and voluntary manslaughter defined.

43. If a husband finds another in the act of adultery with his wife and in the first transport of passion excited by it, then and there kills him, it will not be murder, but manslaughter only. It is not necessary, however, that he should witness an act of adultery committed by them. If he saw the deceased in bed with his wife, or leaving it, or found them together in such a position as to indicate with reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it, the effect will be the same; and if under such circumstances the mortal blow was then and there given, the killing will be manslaughter merely. But no other knowledge on the part of the husband, however positive, otherwise acquired of their adulterous intercourse, can suffice to mitigate and reduce the killing from the crime of murder to manslaughter.

44. In order to exempt a person from responsibility for a criminal act on the ground of partial insanity, the controlling power of it, whether arising from insane delusion, or from a real cause, must be so intense and overwhelming, as utterly to deprive the party of his reason in regard to the act charged as criminal. And the enquiry in a case like this is always narrowed down to the question of the insanity of the prisoner at the time of the commission of it, and in respect to the criminal act charged against him. Was he at the time, and as touching that act, sane or insane? If he had sufficient mental capacity at the time of committing it, to distinguish between the right and wrong of that particular act, and to know that it was wrong, he is criminally responsible for it. And as every man is presumed in law to be sane and possessed of a sufficient degree of reason to be respon-

HOMICIDE, Continued.

sible for his crimes, until the contrary is proved to the satisfaction of the jury, and the alleged insanity of the prisoner at the time of committing the crime charged against him is set up as matter of defense to it, the burden of showing it lies on the prisoner. It must be proved like any other fact to the satisfaction of the jury beyond a reasonable doubt; otherwise the presumption of sanity or soundness of mind will remain un rebutted and in full force. *The State v. Pratt*, 249, 250.

45. Express malice aforethought, and malice aforethought implied by law, and murder of the first and second degree under the statute, and manslaughter defined and distinguished.

46. One born deaf and dumb, and who has never received any education in the schools designed for mutes, or religious or moral instruction, will be criminally responsible for murder of either degree, or of manslaughter, as the case may be, if he has sufficient capacity, reason and intelligence to distinguish between right and wrong with reference to the act when he committed it, and knowledge and consciousness that it was criminal and would subject him to punishment, and to understand the nature and consequences of it. But the law will not imply malice from the use of a knife by one afflicted with that natural infirmity, and a violent temper when angry and excited, with which he furiously stabs and kills another who has suddenly assaulted and thrown him, and is about to whip him, unless there is evidence sufficient to satisfy the jury that he had provoked the assault for the purpose of stabbing the deceased with it.

47. On an indictment for murder against a person deaf and dumb from his birth, the killing by him being proved, the law will presume that he was criminally responsible for it, until the contrary appears. *The State v. Draper*, 291.

48. Murder with express malice aforethought at common law is murder of the first degree under the statute.

49. Circumstantial evidence is receivable both in civil and criminal cases; and the necessity of admitting it in criminal matters, is even greater than in civil matters, and it is adopted the more readily in proportion to the difficulty of proving the fact by direct evidence, and because of the ease with which it can be disproved by the proof of other facts inconsistent with it. But to warrant a conviction it must be entirely satisfactory, and of such significance, consistency and force, as to produce conviction in the minds of the jury of the guilt of the accused beyond a reasonable doubt.

HOMICIDE, Continued.

50. But the rule in regard to reasonable doubt in criminal trials, requires that the jury shall be satisfied of the guilt of the accused to a moral certainty, not to an absolute certainty. *The State v. Goldsborough*, 302, 303.

51. On a trial for murder of the first degree the voluntary confession of it made by the prisoner, before his arrest, to a person having no authority over him, who said to him out of the hearing of any other, that he must know something about the killing of the deceased, and if he would tell him all about it, he would say nothing about it to any one, and upon which the prisoner then stated to him how he and another person killed him, held to be admissible in evidence. *The State v. Darnell*, 321.

52. Although the testimony of a witness who has been convicted of murder of the first degree, but has not yet been sentenced for it by the Court, is admissible on the part of the State, under the statute in such case made and provided, on the trial of another person separately indicted and tried at the same term for the same murder, yet, if it is uncorroborated by the testimony of any other witness in the case, the Court will leave it, as the statute does, to the jury to judge of the credibility and weight of it with the taint of his conviction attaching to it. But if the credibility of it is further weakened and impaired by contradictory declarations made by him in regard to the prisoner's participation in the murder before his own trial, and also by contradictory testimony of other witnesses in the case, the Court will advise the jury that they ought not to convict the prisoner on his testimony alone. *The State v. Lowber*, 324.

53. In case of a fight between two persons, nothing short of imminent peril to his life or person from the other, can justify or excuse the one in killing the other, even if the other was the aggressor and assailant; and without that in no such case can the homicide fall below the grade of manslaughter. *The State v. Townsend*, 337.

54. If one person shoots another with a deliberate intent to kill and kills him, it will be murder with express malice, and of the first degree under the statute; but if he only intended to disable him by shooting his arm off, it will be murder of the second degree under the statute. If in a collision between two persons one is stabbed by the other with a knife who seizes a loaded gun at hand and shoots and kills him, it will amount to manslaughter only. *The State v. Costen*, 340.

55. Express malice is where one person kills another with a se-

HOMICIDE, Continued.

date, deliberate mind and formed design; and such design may be shown by the circumstances attending the act, such as the deliberate selection of a deadly or dangerous weapon, antecedent threats or menaces, and privily lying in wait, former grudges and preconcerted schemes to do the party slain some great bodily harm. And when committed with express malice aforethought it is murder of the first degree under the statute.

56. Implied malice is an inference of law from the facts found by the jury; and among these facts, the actual intention of the prisoner at the commission of the fatal act becomes an important and essential fact to be ascertained by the jury, for though he may not have intended to take away life, or to do any great bodily harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act, such for instance, as intending to rob the party slain, from which the law raises the presumption of malice. If he intended to kill him, he is guilty of murder of the first degree, but if he did not intend to kill him, and was engaged in any other felonious or unlawful act, such as an attempt to rob him, or the like, he is guilty of murder of the second degree. *The State v. Boice*, 355.

57. In a trial for murder it is competent for the prosecution to prove that the prisoner had a motive for committing it, and what the motive was.

58. In such a trial and under the defense of insanity an odd collection of various articles of no novelty or value, even as curiosities, which the prisoner had made from time to time, and had long preserved with the view of starting a natural museum in the town of Milton, Delaware, was allowed by the Court to be produced and displayed in evidence before the jury.

59. Scientific works on what is termed medical jurisprudence, although admissible and allowed to be read on a trial before the Court and jury, have not the weight of legal authorities, except so far as the views expressed in them on the subject of insanity, have been recognized and sustained by judicial rulings and decisions in the trial of cases in Courts of Justice.

60. On an indictment for murder, if the accused under the plea of not guilty, the only plea usually entered to such an indictment, sets up at the trial the defense of insanity, and which admits by necessary implication that he committed the act of killing alleged in it, he is bound to prove, or it must appear from all the evidence in the case, to the satisfaction of the jury beyond a reasonable doubt, that he had not sufficient soundness of mind and reason

HOMICIDE, *Continued.*

when he committed the act, to be able to distinguish between right and wrong as applied to the act, and to understand the nature, character and consequences of it, and had not sufficient mental power to apply that knowledge to his own case, and had not through that knowledge and consciousness the ability to control himself, and choose by an effort of the will whether he would, or would not commit it.

61. And so when the ground of self-defense is set up under the general issue and plea of not guilty, the burden of establishing it to the satisfaction of the jury beyond a reasonable doubt, rests on the accused, unless it otherwise so appears from the evidence. And to constitute and establish that defense in such a case as this, the jury must be satisfied from the evidence that the deceased made a violent assault at the time upon the prisoner, with a deadly or dangerous implement likely to produce death, or enormous bodily injury, and that the prisoner was in imminent peril of being killed or so injured by it, and that without having the time, or the means, or the opportunity of retreating from or avoiding such an assault upon him, he killed the deceased in repelling it.

62. A judicial confession of the homicide made by the accused and produced in evidence on the part of the State in the trial, derives from that circumstance no other weight or effect in favor of the prisoner, or against the State, than it would otherwise be entitled to in law. The whole of the confession, however, is to be considered and weighed by the jury, but it is not to be supposed or assumed that all parts of it, or all the statements contained in it, are entitled to equal weight and credit as evidence in the case; On the contrary, the jury may credit and believe that portion, or so much of it as charges, or is against him, and discredit and reject that part, or so much of it as is in his favor, or tends to excuse or exonerate him, if they find sufficient ground for so doing on a full consideration of all the evidence in the case. *The State v. West*, 371, 372.

63. If the facts attending the affray between the deceased and the prisoner were not such as to convince the jury that the prisoner had reasonable grounds to believe that he was in immediate danger of being killed by the deceased, or of suffering great bodily harm at his hands, and had no way of escape from him but by killing the deceased, it could not be excusable in self-defense, but it would amount to the crime of manslaughter, at least. *The State v. Vines*, 424.

64. Murder with express malice and of the first degree, and with

HOMICIDE, *Continued.*

implied malice and of the second degree under the statute, and manslaughter defined and distinguished.

65. The mode and manner of the killing must be proved to the satisfaction of the jury substantially as alleged in the indictment; and when it is alleged in the indictment that the accused with malice aforethought threw the deceased into a creek by means whereof he was then and there drowned, these allegations must be proved and established to the satisfaction of the jury beyond a reasonable doubt, to warrant a conviction of the accused; but this may be done by either direct or circumstantial evidence; when the evidence, however, is wholly circumstantial, it must be of such a character as to exclude every other reasonable hypothesis than that of the guilt of the accused.

66. The *onus* of proof is on the State to establish the *corpus delicti*, or the killing by the means substantially as alleged in the indictment, and that the deceased came to his death by drowning, and by being thrown into the creek alleged with malice aforethought by the accused. *The State v. Taylor*, 436.

67. On a trial of murder for killing a person who is merely trespassing on his lands at the time, it is not competent for the prisoner to prove, in order to rebut the allegation of malice aforethought, either express or implied, that gangs of marauders infested the neighborhood and often went armed, and were in the habit of frequently committing depredations on the farmers there, even in an open and defiant manner, taking their property and not only threatening, but actually resorting to personal violence against them when ordered from their premises, and that the prisoner was well aware of that fact at the time of the occurrence, unless it also appears that such personal violence was threatened, or committed upon him by the deceased or some of his companions so trespassing on his premises at the time of the shooting of him by the prisoner. Because no trespass merely on the property of another, real or personal, can reduce the willful killing of the trespasser by the owner of it, to the crime of manslaughter, or below the grade of murder of the second degree under the statutes, where it is done with a deadly-weapon, or instrument likely to cause death. *The State v. Woodward*, 455.

68. A peace-officer or policeman of a city in making an arrest for a mere misdemeanor has no right to kill the offender, except when it becomes reasonably necessary in a case of resistance to the arrest; nor has he a right when in pursuit of a person who is fleeing from arrest for a misdemeanor merely, to shoot at him to

HOMICIDE, Continued.

prevent his escape, and if he does so and kills him, it will be murder, and not manslaughter; but the law is otherwise when the arrest is for a felony, for in such case, if in the pursuit he shoots and kills the fleeing offender, and could not overtake and arrest him without shooting him, the killing will be justifiable.

69. And if such an officer in the pursuit of a person fleeing from arrest for a mere misdemeanor, shoot at him with the deliberate intention of killing him, or doing him some great bodily harm, but misses him and kills another person, his offense will be the same as if he had shot and killed the fleeing offender, and will be murder, and not manslaughter. *The State v. O'Niel*, 468.

70. Where one is assaulted, upon a sudden affray, and in defense of his person where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant, it is excusable homicide committed in self-defense, and constitutes no crime or offense in law. But to have this effect it must be shown that the slayer was closely pressed by the other party, and that he in good faith and with the honest intent to avoid the violence of the assault, retreated as far as he conveniently or safely could; and the jury must be satisfied from the proof that unless he had killed his assailant, he was in imminent and manifest danger either of losing his own life, or of suffering enormous bodily harm.

71. Voluntary manslaughter is where one kills another in heat of blood, and usually arises from fighting, or provocation, and from the sudden heat of the passions; but in the case of fighting in order to reduce the crime from murder to manslaughter, it must be shown that it was not preconcerted, and that there was not sufficient time for the passion to subside; and although there was not time for the passion to subside, if the case be attended with such circumstances as indicate malice in the slayer, he will be guilty of murder.

72. Murder with express malice and of the first degree, and with implied malice and of the second degree under the statute defined.

73. As before stated a man may defend himself against an assailant where he cannot escape from him, but he cannot do it as he pleases; for if one be assailed with the fist, he cannot defend with a club, or deadly weapon, because the defense is altogether disproportioned to the assault; and if in such defense, death ensues, the law implies malice from the character of the weapon used, and the party is guilty of murder. So if a party as-

HOMICIDE, Continued.

sailed has escaped from his assailant, and then returns to him and attacks and kills him, he becomes the aggressor, and is guilty of murder, from the malice displayed. For whenever the fatal act is committed deliberately, or without adequate provocation, the law presumes it was done with malice, and in such case it behooves the prisoner to show from evidence, or by inference from the circumstances of the case, that the offense does not amount to murder.

74. Express malice is proved by evidence of a deliberate, formed design to kill another, which may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, a previous grudge &c.

75. The law fixes no measure to the time for the premeditation required to constitute the killing murder. The intent to take life may arise with but very little reflection.

76. Where a person in the heat of passion upon such provocation as would produce in most persons a very high state of excitement, kills another as the result of such heat merely, and not of prior hatred or ill-will, the offense is not murder, but manslaughter. *The State v. Rhodes*, 476, 477.

77. Murder of the first and second degree and manslaughter defined.

78. When in a case of homicide the defense is that at the time of the act done the prisoner was under the influence of *delirium tremens*, an insane disease, destroying accountability for his act of homicide, to make such defense available he must show it by proof to the satisfaction of the jury and to their minds, convincing, and unless he does the verdict cannot be in his favor. It would be for the jury to decide on all the evidence in the case whether there was in their minds sufficient proof to convince them that the horrid act, so deliberately done by the prisoner, was to be ascribed to insanity and the disease *delirium tremens*, for if it was the result of the mere phrensy of drunkenness, and not of actual insanity produced by continued dissipation, it would not excuse the crime. Insanity is not to be presumed, but must be affirmatively proved to overcome the presumption of sanity in all cases; and if the acts and conduct of the prisoner show to the minds of the jury conclusively that he had sufficient reason to contemplate the act he did and its consequences, at the time he did it, they are of more value than the opinions of witnesses, how learned and experienced soever they may be. But if upon a calm review and consideration of all the testimony, and regarding it alone, the jury have in

HOMICIDE, *Continued.*

their minds a reasonable doubt in the case, such as an honest, candid, intelligent mind may entertain, of the guilt of the prisoner, that is, of his capacity to know that it was wrong to kill his wife, he is entitled to the benefit of that doubt and should be acquitted. *The State v. Thomas*, 511.

79. Murder of the first and second degree, and voluntary manslaughter defined.

80. No quarrel or angry altercation between the parties, or threat or language uttered, or motion or gesture made during it by the deceased towards the prisoner, however provoking or insulting they may be, or however much they may excite his anger and heat his blood, without an assault actually made or menaced by the deceased upon his person, can constitute a sufficient provocation to reduce the homicide from murder to manslaughter, when it is committed, however suddenly, with a deadly weapon. *The State v. Draper*, 531.

81. It is murder of the first degree and punishable with death to willfully and maliciously place an obstruction on a railroad track with intent to displace or throw off any engine, tender, train or car running thereon, if displaced or thrown off, and any person is thereby killed. And the malicious intent in such a case will be presumed from the willful and malicious act of placing the obstruction on the track, as the ordinary and natural consequence of placing an obstruction on a railroad track for such a purpose, is to displace or throw from it, the engine and the whole, or some portion, of the train running against it, or over it.

82. By the law of this State where one person in pursuance of any deliberate purpose or plan of taking another's life, or doing him some great bodily harm, kills him, he is guilty of murder of the first degree; so if he purpose to commit an act punishable with death, and in the execution of that purpose kills another.

83. But where there is not evidence of any such purpose or plan, and yet a person is killed in consequence of any felonious act on the part of the accused, or of an act that denotes a disregard or recklessness of the lives or persons of individuals generally, it is murder of the second degree. And all homicides above the grade of manslaughter, and not reaching that of murder of the first degree, are murder of the second degree.

84. Where there is no malice or evil design, either in fact or in law, and yet death ensues from a merely unfortunate act, or from a lawful act done in an improper manner, whether by excess or

HOMICIDE, Continued.

culpable ignorance, the offender is guilty of manslaughter. In connection with this it is proper to say that the prisoner was unlawfully upon the track of the railroad company; he had no business there, but was a trespasser, and his act of obstruction was an aggravation of his trespass. Therefore should it turn out that the jury find themselves unable to bring him in guilty of one or the other degrees of murder, they should convict him of manslaughter.

85. When once insanity is established by proof, it is presumed to continue until restoration to reason has been established by evidence also; but until it is shown to exist, the law presumes every man to be sane and responsible for his acts, until the contrary appears. Insanity, to render a person irresponsible for crime, must be such as to render him incapable of distinguishing between right and wrong in reference to the act itself he is about to commit, and deprive him of the power to choose whether he will commit it or not.

86. In all cases of admissions or confessions the whole of what the party said at the same time, and relative to the same subject should be given in evidence; but it does not follow that all parts of the statement are to be received as equally worthy of credit; for the jury is to consider how much of the whole they deem worthy of belief, including, as well, the facts asserted by the party in his own favor, as those making against him. *The State v. Brown*, 539, 540.

87. Murder of the first degree is where the killing is with express malice aforethought with respect to the victim himself, or where the victim was not the subject of the malicious purpose, but another person was.

88. Excusable homicide on the ground of accident; and justifiable homicide in defense of one's person, or of a member of his family, or of his dwelling house; and manslaughter, defined.

89. Malicious homicide which embraces only one general crime, that of murder, divided into two degrees, murder of the first degree and murder of the second degree, defined.

90. In case of the homicide, or killing of one person in the attempt to kill another, the jury must decide from the evidence under the instructions of the Court as to the law applicable to it, what the offense would have been had he killed the person intended, for in such a case his offense will be what it would have been if he had killed the person he attempted to kill. *The State v. Dugan*, 563.

HUSBAND AND WIFE.

See MARRIED WOMEN.

ILLEGAL VOTING.

A county tax assessed against the land of a father, and so continued for several years after his death without a will, if paid by one of his sons and heirs-at-law still owning it in fee and coparcenary, within the times respectively prescribed for the assessment and payment of such a tax in the constitution, will entitle any other son and coparcener to vote, so far as the payment of a county tax is required to qualify him for it. *The State v. Livingston*, 109.

INDENTURE. See APPRENTICE. • RECORD, 1, 2, 3, 4, 5, 6.

INDICTMENT.

1. The property in gold or silver coin must be alleged to be of the money, and not of the goods and chattels, of the party from whom it was stolen, in an indictment for larceny. *The State v. Parker*, 9.

2. A prisoner indicted for larceny under the laws of the State and returned by the Sheriff *cepi corpus* and in his custody, will be tried for the offense, notwithstanding he is also in his custody as the deputy of U. S. Marshal of the district, and in the jail of the county under the statute of the State allowing the use of its jails in such cases, for robbing the U. S. Mail. *The State v. Townsend*, 10.

3. In an indictment for stealing shad it is not necessary to allege that they were dead when stolen, for where a fish or an animal is called by the same name, either dead or alive, it is competent to prove the stealing of it in the dead state without alleging it. *The State v. Donovan*, 43.

4. On an indictment for stealing a clock from the trustees of a church incorporated according to the provisions of the general statute, and so proved on the trial, it is sufficient to prove who were the trustees of it at the time of the larceny without producing the record of any other than the original election of trustees under it. *The State v. Livingston*, 71.

5. On an indictment for aiding the escape of an indentured servant from her master, the omission to insert her name in the binding clause of the indenture, will not be fatal, if it appears in the *habendum*, and other parts of the indenture. *The State v. Owens*, 72.

INDICTMENT, *Continued.*

6. To send a threatening letter to another for the purpose of extorting money from him, and menacing him with personal violence or injury in case of his refusal to comply with the demand of such a character as would be calculated to induce a firm and prudent man to part with his money and submit to it, is an indictable offense at common law, and under the general statutory provision of this State in regard to common law offenses not expressly provided for by statute, notwithstanding the party menaced may not have yielded to the threat. *The State v. Evans*, 97.

7. All felonies in this State are expressly and especially made so in all cases by statute, and, therefore, there are none here at common law; and as the offense of bigamy is but a misdemeanor, and not a felony in this state, to allege in an indictment that it was feloniously and unlawfully committed will be fatal to it. *The State v. Darrah*, 112.

8. A false and fraudulent representation made by the defendant to the prosecuting witness, that he was about to loan a sum of money to a person named by him and known to the prosecuting witness to be of good credit, and if he would let him have one-half of the amount, he would repay it to him in twelve days with one-half of the profits, imported among other fallacious representations, a false and fraudulent pretension of a present and immediate purpose on his part to loan the amount of money mentioned to the person named, and he was therefore indictable for obtaining the money thereupon loaned him by the prosecuting witness under such a false and fraudulent pretense. *The State v. Nichols*, 114.

9. In an indictment for the felonious burning of a barn not parcel of a dwelling-house under the statute, the property in the barn must be laid in the person then in the possession of it *suo jure*, for in statutory felonies analogous to arson at common law, the analogies of the common law in this respect have always been followed. *The State v. Bradley*, 164.

10. A prisoner indicted for larceny had been arraigned and had pleaded not guilty, and a jury had been duly empaneled and sworn to try the case, when it was discovered that the indictment contained no allegation as to the value of the goods stolen. *Held* that the Attorney General might at that stage of the trial enter a *nolle prosequi*, and indict him a second time for the same offense, because in contemplation of law the prisoner had not been put in jeopardy on the first indictment. *The State v. Crutch*, 204.

11. The defendant was indicted for a malicious injury in cutting the cotton warp on one hundred and twenty-six looms, of the value

INDICTMENT, *Continued.*

of one thousand dollars, in the cotton factory of Daniel Lamot, Jr., in Brandywine hundred, to the great damage of the said Daniel Lamot, Jr., and against the peace and dignity of the State. The Court *held* the alleged malicious injury to be an indictable offense under the laws of this State, which by necessary implication and construction make a malicious injury done by one person to another, either in his person, or in his real or personal estate, a breach of the peace, and as such, an indictable misdemeanor in this State. *The State v. Hamilton*, 281.

12. In an indictment for burglary in the dwelling-house of a father, and stealing therefrom sundry articles, consisting of ornaments merely, and not necessities, belonging to a minor and unmarried daughter then living in the house with him and his family, the property in them should be laid in the daughter, and not in the father. *The State v. Lee*, 335.

13. The gist of the offense alleged in an indictment for a conspiracy to do an unlawful act, consists in the agreement to commit the act, and it is complete as a conspiracy and indictable as such, without doing any overt act in execution of the agreement, or of the design with which it was entered into.

14. Upon an indictment alleging that the two persons named in it conspired together, and with divers other evil-disposed persons whose names were unknown to the grand jury, to commit the crime alleged in it, one of them may be convicted, and the other acquitted, if the jury are satisfied from the evidence that any other person conspired with either of them to commit it. *The State v. Adams & Aiken*, 361.

15. A general verdict returned upon an indictment for breaking and entering in the night time the warehouse of a railroad company with intent to steal certain goods therein, and for stealing the same therefrom with two counts in the indictment, the first alleging the property in the goods to be in the railroad company, and the second alleging the property in them to be in the general owner of them, the railroad company being at the time the bailee of them merely, will not be set aside on a motion in arrest of judgment. *The State v. Hill*, 421.

16. In an indictment for larceny consisting in the stealing of wheat grown on a farm and from a barn on it which belonged to a married woman in her own right, the property in the wheat stolen may be laid in her husband, if he usually receives, sells and disposes of the proceeds and crops of the farm for his own use with her consent, and she claims to exercise no control or ownership over them. *The State v. Jackson et al.*, 561.

SEE ARSON, 3. LARCENY, 1, 2. .

INSANITY. See HOMICIDE, 28, 44, 58, 59, 60, 78, 85.

JEOPARDY. See INDICTMENT, 7.

JUDGMENT.

A general verdict returned upon an indictment for breaking and entering in the night time the warehouse of a railroad company with intent to steal certain goods therein, and for stealing the same therefrom with two counts in the indictment, the first alleging the property in the goods to be in the railroad company, and the second alleging the property in them to be in the general owner of them, the railroad company being at the time the bailee of them merely, will not be set aside on a motion in arrest of judgment. *The State v. Hill*, 421.

JUSTICE OF THE PEACE. See APPRENTICE, 1, 2, 3. CONFES-
SION. FORGERY.

LARCENY.

1. A, having four bank notes folded together in his pocket book, consisting of two one hundred dollar notes, a fifty dollar note, and a ten dollar note, went to the store of B to pay him two dollars which he owed him and told him he had come to pay it, and by mistake took from it one of the hundred dollar notes instead of the ten dollar note, and handed it to B, at the same time apologizing to him for handing him a ten dollar note in paying so small a bill. B took the one hundred dollar note, looked at it, and then went with it to his money drawer, opened it and looked in it, and then told him he could not make the change, but he would step out and get the change in the store next to his, which he did, and soon returned and handed him eight dollars as his change for it. This occurred on Thursday evening after the lamps had been lighted in the store, but A did not discover his mistake until the following Saturday, when B alleged that he had committed no mistake, that he had given him a ten dollar note, and not a one hundred dollar note, and that he returned him eight dollars, the right change for it. *Held* that if B knew that it was a one hundred dollar note, and not a ten dollar note, when he took it from A, and looked at it and went to his money-drawer with it and procured and returned to him the eight dollars as the right change for it, and designedly and fraudulently concealed his knowledge of the mistake of A from him, and afterwards concealed it and appropriated the one hundred dollar note to his own use without the consent of A, it was a felonious taking and carrying away of the note by him with that intent, and constituted the crime of larceny. *The State v. Williamson*, 155.

LARCENY, Continued.

2. A passenger railroad ticket in a ticket office of the company, is not a subject of larceny at common law, or under the provisions of the statute. *The State v. Hill*, 420.

See MARRIED WOMEN, 3.

LETTER. See THREATENING LETTER.

MALICIOUS INJURY.

The defendant was indicted for a malicious injury in cutting the cotton warp on one hundred and twenty-six looms, of the value of one thousand dollars, in the cotton factory of Daniel Lamot, Jr., in Brandywine hundred, to the great damage of the said Daniel Lamot, Jr., and against the peace and dignity of the State. The Court *held* the alleged malicious injury to be an indictable offense under the laws of this State, which by necessary implication and construction make a malicious injury done by one person to another, either in his person, or in his real or personal estate, a breach of the peace, and as such, an indictable misdemeanor in this State. *The State v. Hamilton*, 281.

MANIA A POTU. See HOMICIDE, 5.

MANSLAUGHTER. See HOMICIDE.

MARRIED WOMEN.

1. Notwithstanding the statutes enlarging the rights, powers and liabilities of married women in respect to matters of contract, and exempting them when trading in their own names in goods, wares and merchandise from taking out retailer's licenses therefor where the purchases are less than one thousand dollars per annum, their legal relations and liabilities remain the same as heretofore in respect to crimes and misdemeanors committed by them.

2. A husband living in the same house with his wife so trading in and selling intoxicating liquor without a license therefor, is liable on an indictment against him for it. *The State v. McDaniel*, 506.

3. In an indictment for larceny consisting in the stealing of wheat grown on a farm and from a barn on it which belonged to a married woman in her own right, the property in the wheat stolen may be laid in her husband, if he usually receives, sells and disposes of the proceeds and crops of the farm for his own use with her consent, and she claims to exercise no control or ownership over them. *The State v. Jackson, et al.*, 561.

MEDICAL JURISPRUDENCE. See WORKS ON.

MISDEMEANOR.

1. All felonies in this state are expressly and specially made so in all cases by statute, and, therefore, there are none here at common law; and as the offense of bigamy is but a misdemeanor, and not a felony in this state, to allege in an indictment that it was feloniously and unlawfully committed will be fatal to it. *The State v. Darrah*, 112.

2. In a case of misdemeanor merely, a peace-officer has no authority to arrest the offender without a warrant, unless it is committed in his view. This is a well-settled principle of the common law, and the town law of Dover conferring powers on its constables constitutes no exception to it in such a case. *The State v. Crocker*, 434.

See HOMICIDE, 26, 68, 69.

MURDER. See HOMICIDE.

MUTES. See HOMICIDE, 45, 46, 47.

NEW TRIAL.

1. The Court having left the question to the jury on all the evidence in the case, will not after trial and conviction of murder of the first degree, set aside the verdict and grant a new trial, because they did not charge them, as requested by the counsel for the prisoner, that if they believed that at the time of committing the act he was so much intoxicated as to produce a state of mind unfavorable to deliberation or premeditation, it would reduce the grade of the offense from murder of the first to murder of the second degree under the statute. *The State v. Bowen*, 91.

2. The Court will not set aside the verdict of the jury and grant a new trial because they were instructed in the charge that "when the fact appears that connection has been had against the consent of the woman, the law implies force," and further, "the two facts for your consideration are the fact of connection and the fact of consent or no," instead of defining and stating it, in the language of the books, as follows: "rape is the having carnal knowledge of a woman by force and against her will." *The State v. Riggs*, 120. SEE JUDGMENT.

NOLLE PROSEQUI.

A prisoner indicted for larceny had been arraigned and had pleaded not guilty, and a jury had been duly empaneled and sworn to try the case, when it was discovered that the indictment contained no allegation as to the value of the goods stolen. *Held*

NOLLE PROSEQUI, Continued.

that the Attorney General might at that stage of the trial enter a *nolle prosequi*, and indict him a second time for the same offense, because in contemplation of law the prisoner had not been put in jeopardy on the first indictment. *The State v. Crutch*, 204.

ORNAMENTS. See INDICTMENT, 10.

PEACE OFFICER.

1. It is not only the right, but the duty of a constable and police officer of Wilmington on his beat at a late hour of the night, if a noise or disturbance occurs under his own observation, to arrest at his own instance and without warrant, especially charged as he is with the preservation of the peace, good order and quiet of the city, any one disturbing it whenever the circumstances require it. *The State v. Russell*, 122.

2. In a case of misdemeanor, merely, a peace-officer has no authority to arrest the offender without a warrant, unless it is committed in his view. This is a well-settled principle of the common law, and the town law of Dover conferring powers on its constables constitutes no exception to it in such a case. *The State v. Crocker*, 434.

See HOMICIDE, 26, 68, 69.

PLEADING. See INDICTMENT.

POLICE OFFICER. See PEACE OFFICER.

PRACTICE.

A prisoner indicted for larceny under the laws of the State and returned by the Sheriff *cepi corpus* and in his custody, will be tried for the offense, notwithstanding he is also in his custody as the deputy of U. S. Marshal of the district, and in the jail of the county under the statute of the State allowing the use of its jails in such cases, for robbing the U. S. Mail. *The State v. Townsend*, 10.

See ARSON, 1. JUDGMENT. NEW TRIAL.

PRETENSES. See FRAUDULENT PRETENSES.

PRINCIPAL AND ACCESSORY. See RAPE, 4.

PROPERTY IN GOODS AND MONEY STOLEN. See INDICTMENT, 1, 3, 4, 11, 14.

PROSECUTING WITNESS. See RAPE, 1, 5.

RAILROAD TICKET. See LARCENY, 2. JUDGMENT.

RAPE.

1. In a trial for rape the prosecuting witness cannot be asked the question if she had not had sexual intercourse with another person prior to the commission of the alleged offense in question.

2. Nor is one who has been convicted upon her testimony at the preceding term of Court of a rape committed upon her at the same time in company with the prisoner, a competent witness for the prisoner on the trial of his case, although she has acknowledged that she committed perjury as a witness in the preceding trial. *The State v. Turner*, 76.

3. The Court will not set aside the verdict of the jury and grant a new trial because they were instructed in the charge that "when the fact appears that connection has been had against the consent of the woman, the law implies force," and further, "the two facts for your consideration are the fact of connection and the fact of consent or no," instead of defining and stating it, in the language of the books, as follows: "rape is the having carnal knowledge of a woman by force and against her will." *The State v. Riggs*, 120.

4. On an indictment and trial against two for rape, one as principal and the other as accessory to the commission of it, the voluntary confessions of the latter formally taken by the committing magistrate as required by the statute, is admissible in evidence just as it is drawn against him on their joint trial, but after its admission the Court will specially instruct the jury that it is not evidence against the other prisoner. *The State v. Jones, et al.* 317.

5. On an indictment and trial for rape, it behooves the jury to be satisfied from the evidence beyond a reasonable doubt, first, that the alleged rape was actually committed and consummated, and secondly that it was committed by the prisoner at the bar, with force and against the will of the prosecuting witness; but to consummate the rape and complete the offense, it is not necessary under our statute on the subject to prove more than an actual *penetravit* to warrant a conviction of the offense. *The State v. Burton*, 363.

6. On an indictment for burglary with intent to commit a rape, the alleged intent is a material and substantive fact to be proved to the satisfaction of the jury, as much so as any other material allegation in it; and they must be satisfied from the facts and circumstances attending it that the breaking and entry was made

RAPE, Continued.

by the prisoner with the intent to commit the alleged rape with force, and against the will of the party named. *The State v. Carpenter*, 367.

RECORD.

1. In a case of binding under the third section of the statute, it is sufficient if the approval of the justices appears anywhere in or upon the indenture.

2. It is only the money stipulated to be paid to the parents, and not to the servant indentured on the expiration of the service, that is required to be paid in installments; and although the sum was fifteen, instead of ten dollars, it was no ground of exception to the indenture, for the statute leaves it to the discretion of the justices to designate the amount to be paid to a colored child in lieu of education.

3. On an indictment for harboring such an indentured servant, the record of the indenture will be admissible in evidence, although the original was not delivered by the justices to the Recorder of Deeds for the county, within the time prescribed by the statute. Nor can the indentured servant avoid it for that reason by leaving the service. *The State v. Hooper*, 17.

4. On an indictment for stealing a clock from the trustees of a church incorporated according to the provisions of the general statute, and so proved on the trial, it is sufficient to prove who were the trustees of it at the time of the larceny without producing the record of any other than the original election of trustees under it. *The State v. Livingston*, 71.

5. On an indictment for aiding the escape of an indentured servant from her master, the omission to insert her name in the binding clause of the indenture, will not be fatal, if it appears in the *habendum*, and other parts of the indenture. *The State v. Owens*, 72.

6. The records of a Justice of the Peace are not records of a Court of Record in the true import and legal signification of that term, and a forgery of such a record by a Justice of the Peace is not within the provision of the statute, which makes the forging of the record of a Court of Record an indictable offense. *The State v. Floyd*, 110.

RES GESTÆ.

1. A declaration made by a party within a few moments after he has shot another and fled from the scene of the shooting, that it was done accidentally or unintentionally by him, is not admissible in evidence as part of the *res gestæ*.

2. On a trial for an assault and battery with intent to kill and murder, the intent must be proved as any other material fact alleged in the indictment, in order to sustain it. *The State v. Seymour*, 508.

RESISTING PUBLIC OFFICERS. See **PEACE OFFICERS.**

SELF-DEFENSE. See **HOMICIDE.**

SHAD. See **INDICTMENT**, 3.

TAX. See **ILLEGAL VOTING.**

THREATENING LETTER. See **INDICTMENT**, 6.

TRESPASS. See **HOMICIDE**, 25, 67, 81, 83, 84, 85, 86.

MALICIOUS INJURY.

VERDICT. See **JUDGMENT.** **NEW TRIAL**, 1, 2.

VOTING. See **ILLEGAL VOTING.**

WITNESS. See **APPEAL IN BASTARDY**, 1. **CIVIL RIGHTS BILL.** •

HOMICIDE, 52. **RAPE**, 1, 2.

WORKS ON MEDICAL JURISPRUDENCE. See **HOMICIDE**, 59.

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